THE SURVEY AND THE REAL ESTATE TRANSACTION

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BEYOND BASICS: A REVIEW OF CURRENT REAL ESTATE CONCERNS

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INTRODUCTION

The surveyor and the plan of survey play an integral part in the real estate transaction. The surveyor and the lawyer are involved in the certification of title to the purchaser and in giving assurance to the mortgage company, generally as to the "marketability of title".

TITLE

To determine the role of the survey in the transaction one must first look to the word "title". Title was very aptly described by the late W. March Magwood, Q.C. (January 1960) as follows:

"Over the years, the word "Title" has acquired a meaning in general use which is normally thought of as covering all of the interests of an owner in land. We find that the word is used as, " I have surveyed this man's title", and "the title to this man's land is free of encumbrances". In these two examples, the word "Title" has a completely different meaning. In the first instance, the word "Title" is intended to mean ***extent of title****, the boundaries of the land. And in the second instance, the word "Title" in intended to mean the* ***Chain of title****, the factors which affect the ownership of the land. The use of the word "Title" in both of these instances without qualification leads to a misunderstanding of the precise meaning of the word. For example, when a lawyer is searching title, he is normally investigating the chain of ownership and will carry his search back to the 40-year period prescribed. With minor exceptions, he need not be concerned with events preceding this 40-year period. The surveyor however, who is searching the same records to determine the extent of title, must not only search for a different type of material (evidence of old boundaries), but must also continue past the 40-year period, perhaps even another 100 years, until he reaches the original creation of the land. In Legal Surveying and land ownership, the word "Title" should be qualified or explained by defining it as either "****Chain of Title*** *- the province of the lawyer, or "****Extent of Title*** *- the province of the surveyor."*

The survey in a real estate transaction is primarily to enable the certification of title by providing a plan which shows the extent of title and any factors which may affect the quality of that extent. It is not, as many people believe, for the sole purpose of showing the buildings in relation to the property lines.

WHAT IS A SURVEY?

The word "survey" has not been defined by legislation, other than in the Surveys Act which states:

"No survey of land for the purpose of defining, locating or describing any line, boundary or corner of a parcel of land is valid unless made by a surveyor or under the personal supervision of a surveyor (R.S.O. 1980, c. 493, s. 2)."

The Association of Ontario Land Surveyors has dealt with this problem over the years and has determined that a survey of a parcel of land is comprised of four components, which are as follows:

(a) Research
(b) Measurement
(c) Monumentation
(d) Plan and/or Report

Each survey to determine the boundaries of a parcel of land, or to re-establish these boundaries, must consist of all these components. The surveyor is often directed to simply "survey the deed" and not undertake the necessary research and investigation that would constitute a survey. It is a misconception that there are two types of surveys; one using the deed measurements only, and another using full research and analysis of evidence.

"Before undertaking a survey, a surveyor shall refer to the documentary evidence related to the land under survey and the land adjoining the land under survey, including, if applicable:

(a) a Land Registry Office search;
(b) research of own files for related surveys or plans thereof;
(c) a search of the applicable files of fellow surveyors; and
(d) a search of other documentary evidence.

A surveyor shall carry out a thorough field investigation for the best available evidence of all boundaries, lines and corners and give priority to the evidence in accordance with Common Law and Statute Law."
(AOLS Standards)

In surveying or re-establishing boundaries of a parcel, the surveyor has the Surveys Act, R.S.O. 1980, c. 493 to look to. This is a statute which provides for the retracement of township lots and other boundaries. In looking to the Surveys Act, one must realize that although the Act has Regulations appended to it with many methods for re-establishing lost or obliterated boundaries or corners, none of which is used until the surveyor has obtained the best evidence available regarding the boundary. If evidence is available regarding the boundary, then the methods in the Surveys Act do not apply; only when all evidence has been obliterated do the theoretical methods as set out in the Surveys Act apply. In southern Ontario, the methods outlined in the Surveys Act are usually not applicable.

The Surveys Act itself does not set out the priority of evidence under the term "best evidence available".

The surveyor must look to the priorities of evidence as established by various authorities and case law reports.

Surveyors, in laying out and establishing boundaries for the first time, are primarily involved in the technical task of measuring and monumenting a parcel of land to the specifications of the owner; be it a lot on a subdivision or a parcel which is being severed from a farm. The type of monumentation which can be used and the type of plan which must be prepared, are set by Regulations which are appended to such Acts as the Surveys Act, the Registry Act, Land Titles Act, and most recently included in the Standards for Surveys of the Association of Ontario Land Surveyors.

RE-ESTABLISHMENT OF BOUNDARIES

The major portion of a surveyor's work is in re-establishing boundaries, whether it be township lot lines or subdivision lot lines, or a metes and bounds limit. In the re-establishment of these lot lines, a surveyor must consider the best evidence available and **re-establish the boundary on the ground in the location where it was first established, and not where it was necessarily described**, either in the deed or on a plan. This concept is probably the one that is least understood by solicitors regarding surveys. It must be emphasized that the **deed line** or **lot line** as shown on the plan is a mathematical entity on paper alone; the **boundary** exists on the ground. The courts have upheld over the years that the boundary is the re-establishment on the ground of the original running of the line and this re-establishment of the boundary constitutes the deed line. One must realize that the mathematical description of the deed line or lot line on a description or plan is only an attempt to describe the boundary and is not conclusive.

RULES OF EVIDENCE

A hierarchy of types of evidence has developed through law over the past 180 years in Ontario. The first priority is to **natural boundaries**, being the evidence about which man is least likely to make an error. These natural boundaries can include the edge of lakes, cliffs, streams, rock outcroppings and other topographic features which are easily identifiable. Next in the priority of evidence is **original monuments** which are in their original location and undisturbed. If no original monumentation is in existence, the next acceptable evidence is **evidence regarding the original position** of the monumentation or evidence regarding the original running of the line, including possessory evidence. The lowest item in the hierarchy of evidence are the **measurements** either shown on the plan or as stated in the metes and bounds description.

The acceptance of natural boundaries as prime evidence is clear. If a deed called for a parcel to run from a road to the lake, the parcel goes from the road to the lake regardless of the distance stated in the deed. It is clear that the intention was to convey to the water's edge, even though the distance in the deed may be inaccurate.

However many deeds and plans do not include natural boundaries and therefore the surveyor, in re-establishing the property lines, must look for original monumentation. When this monumentation is found and is undisturbed as to location, it must be accepted. One would refer to the case of Kingston v. Highland (1919) 47 N.B.R. 324 which states:

> *"Erroneous as may have been the original survey, or even if there were no survey at all, technically speaking the monuments that were set, the trees that were marked and blazed, must nevertheless govern, even though the effect be to give one proprietor a much greater acreage than his deed would seem to entitle him and give to the adjoining proprietor very much less."*

And again, in McGregor v. Calcutt (1868), 18 U.C.C.P. 39, the Court sanctioned the position of a boundary as being where it had been monumented on the ground and not where shown on a plan:

> *"... the posts or monuments planted in the first survey of the town or village, to designate or define any lot, shall be the true and unalterable boundaries of such lot. It does not say, as shown on the plan, or according to the plan, that the post planted to designate the boundary shall be the true and unalterable boundary. I think, therefore, that the learned Judge was right in telling the jury if the post in dispute was planted in the survey as the boundary of the western end of the northerly line of the lot in question, that it would continue to be such boundary, whether the plan showed it to be so or not."*
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> *(p.43)*

The following two statements from the Land Titles Act show that the original monumentation controls and that the measurements, be they in Land Titles or in the Registry Office, are subservient to the property lines as monumented and established in the first instance.

> *"The description of registered land is not conclusive as to the boundaries or extent of the land.*
>
> *"Where a monument no longer exists, all evidence concerning its original position shall be considered in the re-establishment thereof."*

There is a great misunderstanding among the public that property under Land Titles is guaranteed as to extent, where in fact it is not. The principles of retracement of surveys are no different for Land Titles properties than for Registry properties. The rules of evidence and the hierarchy of evidence as stated above, both apply.

If the surveyor in re-establishing the property boundaries does not find original monumentation, then his re-establishment of the property boundaries depends on the evidence which is available regarding the first survey of the property or the first establishment of the lines. If you will note in the case of Kingston v. Highland quoted above, one need not even prove that the first establishment of the lines had been by a surveyor. In looking for this evidence the surveyor would review the evidence as found on the ground, including possession. This use of the word "possession" is not used in the context of adverse possession, but rather in the context of possession which would relate back to the first survey or first establishment of the line and would be the best evidence of where the line was originally located. An example of this would be a fence or hedgerow which was erected along a surveyed line some 50 years ago. The survey posts have long disappeared however the occupation or possession line is the best evidence relating back to that first survey.

The Ontario Court of Appeal, in Home Bank of Canada v.Might Directories Ltd. (1914), 31 O.L.R. 340, dealt with this kind of a retracement problem:

> *"[The Act] not being applicable, and the original posts or monuments not being in existence, and there being no direct evidence as to their position, some other mode of ascertaining the boundaries of the lots must be resorted to; and in such a case the best evidence is usually to be found in the practical location of the lines made at a time when the original posts or monuments were presumably in existence and probably well-known.*
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> *That is the rule adopted by the State of Michigan and others of the United States.*
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> *In Diehl v. Zanger (1878), 39 Mich. 601, it was said by the Supreme Court that a re-survey, made after the monuments of the original survey have disappeared, is for the purpose of determining where they were, and not where they ought to have been; and that a long-established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments of the original survey have disappeared. After pointing out that the surveyor had reached his conclusion by first satisfying himself what was the initial point of the survey, and then proceeding "to survey out the plat anew with that as his starting point", Mr. Justice Cooley went on to say: "Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey without disclosing errors. This is as true of the government surveys as of any others, and if all the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed the mischiefs that must follow would be simply incalculable, and the visitation of the surveyor might well be set down as a great public calamity. But no law can sanction this course. The surveyor has mistaken entirely the point to which his attention should have been directed. The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. No rule in real estate law is more inflexible than the monuments control course and distance - a rule that we have frequent occasion to apply in the case of public surveys, where its propriety, justice and necessity are never questioned. But its application in other cases is quite as proper, and quite as necessary to the protection of substantial rights. The city surveyor should, therefore, have directed his attention to the ascertainment of the actual location of the original landmarks set by Mr. Campau, and if these were discovered they must govern. If they are no longer discoverable, the question is where they were located; and upon that question the best possible evidence is usually to be found in the practical location of the lines, made at a time when the original monuments were presumably in existence and probably well known ... As between old boundary fences, and any survey made after the monuments have disappeared, the fences are by far the better evidence of what the lines of a lot actually are, and it would have been surprising if the jury in this case if left to their own judgment, had not so regarded them."*
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> *With this statement of the law I entirely agree, and I proceed to apply it to the evidence in the case at bar in order to determine what are the proper inferences to be drawn from the facts and circumstances in evidence as to the position of the line between [the lots]."*
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> *(pp. 345-7)*

The decision in Home Bank was often referred to in subsequent decisions [Weston v. Blackman (1917), 12 O.W.N. 96; Houston v. Austin (1923), 23 O.W.N. 603; Bateman and Bateman v. Potruff, (1955) O.W.N. 329]. The governing nature of monuments over distances has also been confirmed in principle by the Supreme Court of Canada in Humphreys v. Pollock, (1954) 4 D.L.R. 721:

> *"The principle is clear that where distances and monuments clash, in the absence of special circumstances, the monuments prevail; in such cases the context shows the boundary to be the dominant intent, the distance, the subordinate."*
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> *(p. 724)*

A review of the pertinent case law clearly outlines that once the occupation line has been settled and used the onus of proof rests on the person who seeks to disapprove the line. This has been held by the Courts in Palmer v.Thornbeck (1876), 27 U.C.C.P. 291, at pp. 302-3:

> *"In all actions brought to determine the true boundary*

line between properties, the burden of proof lies upon the plaintiff who seeks to change the possession."

MISDESCRIPTION

It is important to realize that the word "boundary" means the original limit of the parcel as it was set out on the ground, not as it was described. The surveyor is often asked to show the deed line as well as the boundary on the plan. If the property is **misdescribed**, the surveyor should only be showing one set of lines on the plan, as the re-establishment on the ground of the original limit constitutes the best evidence of the lands as intended to be described on the deed, and a separate set of "deed lines" do not in fact exist. A review of real estate practice over past years would show that too often the concept of misdescription is not addressed. Misdescription is often treated in the same manner as adverse possession by those not clearly understanding the difference between the two. The surveyor has the expertise and responsibility of determining "misdescription" whereas in the matter of "adverse possession" he can provide the lawyer with the facts available to him.

If no evidence exists, of either the original monuments or evidence of the location of the original monuments or original line, then the surveyor must refer to the measurements as contained in the deed or on the plan.

TYPES OF SURVEY

What then is to be expected if one orders a survey? One must first define which type of survey is required and most importantly the purpose of the survey. The major plans which are prepared by a land surveyor today are as follows.

Plans of Subdivision (M-plan, Registered Plan): These divide property into lots and set out boundaries for the first time after Planning Act approvals have been obtained. It is a fully monumented first establishment of lot lines. The surveyor in preparing a plan of subdivision has to comply with certain conditions which have been set out in the approval of the draft plan. The registration of the plan of subdivision results in a new abstract index under the Registry Act or a new parcel register under the Land Titles Act for recording the instruments which affect the various lots, streets, blocks, etc. which appear on the plan of subdivision.

Reference Plans or R-plans: These are not registered but rather deposited. A reference plan is a "graphic description" and is extremely useful to eliminate the convoluted metes and bounds descriptions that were used in the past and to give a visual portrayal of the lands. Descriptions to convey the land are simplified. The reference plan does not result in a new abstract and any searching of title would have to be by reference to the geographical unit from which the plan has been surveyed. A reference plan in most instances is a fully monumented full survey. It must be pointed out that buildings can be shown on reference plans if they are referenced to the boundary of the parcel, but are not a mandatory requirement. There is often misunderstanding between a client and a surveyor in that the surveyor, when asked to do a reference plan, will not necessarily show the buildings. This item should be clearly specified when ordering the survey.

A Plan of Survey which is not deposited differs little from a reference plan, other than in the form of the plan. The reference plan requires certain certificates and blocks on the plan due to the requirements of the Registry Act and the Land Titles Act. A plan of survey is a plan which does not enter the registry system and the original plan is retained by the surveyor. Copyright rests with the surveyor in this regard. He will issue certain copies of the plan to the client at the time of the fulfillment of his contract with the client. A plan of survey is a fully monumented plan and reflects the same information as would be shown on a reference plan. The plan of survey or reference plan are the recommended plans to be used in the real estate transaction however one finds that most solicitors order a "building location survey" or what was previously termed "mortgage survey" instead. It is interesting that a mortgage survey was never allowed for and the term did not appear in any Regulations or Statutes governing surveys in Ontario.

Written Certificates: A mortgage survey in the past might have been a written certificate. The written certificate was generally never based on survey, rather on a visual inspection of the property with a statement to the effect that there was a house situate on the property and that there were no encroachments. As no survey was undertaken for the certificate, it also could not clearly address extent of title, misdescription or adverse possession. The certificate which was a "limited use document" was constantly being misused and it was found, upon study during the past few years, that it was being used as a survey to certify title in the real estate transaction. Due to the serious misuse of the certificate, its preparation has been discontinued by Ontario Land Surveyors and surveyors further will not re-issue copies of old certificates. The Association can only caution those lawyers who act in real estate transactions to not re-use a written certificate. A written certificate was a surveyor's opinion on only one narrow aspect of the information which the solicitor requires to certify title. The certificates were only to be used for re-financing the property and were never intended to be used in any regard for "certifying title to the purchaser" or "certifying marketability of title to the mortgage company".

Building Location Survey: The Standards of the Association for what a "Building Location Survey" in 1983 must show are clearly illustrated on the sample plan which has been provided to you, and are outlined in the

Standards of the Association. Some of these requirements are as follows:

"1. A plan shall show every right-of-way and easement affecting the land shown on the plan that is,
(a) described in a registered instrument;
(b) shown on a registered or deposited plan; or
(c) evident on the ground.

2. Plans shall show any visible encroachments of fences, buildings or other structures or fixtures from the land being surveyed onto adjacent lands and from adjacent lands onto the land being surveyed.

3. Fences on the limits of the land being surveyed should be so indicated.

4. There shall be shown on a plan clearly and accurately by light lines of uniform width which may be broken,

(a) sufficient data to enable the identification of,
(i) the limits of existing subdivision units included within the land surveyed;
(ii) the limits defined by registered instruments affecting land included within the land surveyed; and
(iii) the limits of subdivision units adjoining the land surveyed and the limits defined by instruments referred to in subclause (d)(ii) that join or intersect the perimeter of the land surveyed;

(b) sufficient data to enable the location of the parcel of land surveyed to be ascertained in relation to the limits of the lot of which it is a part;

(c) the identifying numbers, letters or words of the existing subdivision units included within and adjoining the land surveyed; and

(d) the registration numbers of,
(i) the instruments referred to in subclause (a)(ii); and
(ii) instruments registered under the Registry Act or entered under the Land Titles Act that define the limits of land adjoining the land surveyed.

Subclause 4 (d)(ii) above does not apply in respect of an undivided subdivision unit created by a registered plan of subdivision.

5. The boundaries of the land being surveyed shall be shown on a plan by solid lines of uniform width significantly heavier than the lines referred to in section 14.

6. A Plan shall show:

(a) the position and form of all survey evidence found, conflicting or otherwise

(b) the procedure used in re-establishing all existing boundaries forming part of a survey or on which a survey is dependent.

7. In addition to the Standards for Plans, the Plan of Building Location Survey:

(a) shall show all buildings and structures or the foundations of all buildings under construction on the lands and their distances from the boundaries of the lands;

(b) may show the dimensions of all existing buildings and structures on the lands and/or the dimensions of all foundations of all improvements under construction; and

(c) shall show the municipal address of the property, if any."

(A.O.L.S. Standards)

The main difference between a building location survey and a plan of survey or reference plan is that on a building location survey, only one monument must be placed. A lawyer, in commissioning a building location survey and in using it for the certification of title, can place the same reliance on the information shown on this survey as on a reference plan. However, we would strongly recommend that a **fully monumented plan of survey** be requested, rather than a building location survey.

We would point out that the Standards of the Association require that each survey be accompanied by a written report to the client and that each print be sealed.

"Where no obvious problems or contentious issues are found to exist, a letter or pre-printed form acknowledging the inclusion of copies of the plan of survey, if applicable, the return of documents, the rendering of accounts, etc., may constitute sufficient notice to the client of the completion of the survey.

"If obvious problems or contentious issues are found to exist during the course of the survey the written communication provided to the client shall draw his attention to all such problems or issues.

"Copies of plan of survey provided by a surveyor shall be embossed with the surveyor's seal or a company seal, unless stamped with the disclaimer described in section 5(4)."

(A.O.L.S. Standards)

Misuse of old survey documents: The requests for copies of old plans, sketches, certificates, etc., are greatest on the last week of each month. At that time, the lawyer or client is searching for a document which will satisfy the "survey" requirements of the transaction. As indicated earlier in this paper, the survey shows the extent of title and the quality of that extent. The survey will have determined if:

(a) the boundaries agree with the theoretical deed lines
(b) Is there misdescription?
(c) Is there a possibility of adverse possession?

If there is misdescription a new description may have to be prepared for the purchaser, be it on a Reference Plan or on a metes and bounds description. The survey may show conditions which may allow the solicitor to pursue for his client the acquisition of land due to adverse possession. The encroachments shown on the survey plan must be analyzed as to whether or not they substantially affect the rights and the freedom to use the property by the purchaser. The buildings will be shown on the plan prepared for a real estate transaction and the location and size of these buildings may be relevant to the certification as to the "marketability" of title or the compliance with local building by-laws.

Can these requirements be met by the use of an old document? Documents which were never surveys are constantly being re-used by the client and the lawyer, including building permit sketches. The old "mortgage sketch" which was only concerned with showing the relationship of the house to two of the lot lines, usually the front of the property and one side line, again is not suitable to use for certification of title. The word "sketch" is not used on a document which is a survey and is a clue to the lawyer that the document should not be used to satisfy the survey requirements.

Certain of the older plans of survey were full plans of survey and if brought up-to-date, they can be found useful in a real estate transaction. How does one determine if they are up-to-date?

The practice by some is to have the owner take the plan of survey and sign a declaration that the plan, which may have been prepared anywhere from 5 to 25 years ago, is accurate and up-to-date. This is not, in our opinion, a proper procedure as the owner is not knowledgeable in survey law and does not realize if there are changes, i.e., easements, etc. He is mainly looking at the house and determining whether or not there are any additions to the home which are not reflected on the plan. He also cannot tell if the plan or document was a full survey showing all components which must be reflected if the lawyer is to use that plan to certify title. Is the lawyer risking liability by using such a declaration? Who will be held liable if the purchaser has problems with extent?

What is an Up-to-date Survey? It could be described as a survey prepared within the transaction time or relatively close to the transaction time. This appears to be an acceptable definition and would allow the lawyer to be assured that the surveyor has prepared the plan knowing that a transaction was going to take place and prepared it for that purpose.

The AOLS Standards define an up-to-date survey as follows:

"An existing plan of survey cannot be considered to be "up-to-date" unless,

(i) the survey and plan are in accordance with the current Standards, the R.S.O. 1980, and the Regulations made thereunder;

(ii) upon a field inspection it can be determined that no changes have taken place since the plan was signed."

UPDATING A PLAN

An **"up-to-date survey" is one that has been certified by an Ontario Land Surveyor as reflecting current conditions** and extent of title. A surveyor can bring a survey up-to-date which he prepared in the past if the plan was in a form and of recent enough vintage that allows him to bring it up to today's standards.

A plan of survey showing a concrete foundation goes out of date faster than any other. Usually within months, the home is completed, the fences are erected, the asphalt driveway is put in and the garages on adjacent properties and others are built. Therefore the plan showing the concrete foundation is only usable as long as only a concrete foundation exists on the property. The surveyor preparing a building location survey today showing a concrete foundation can re-attend on the site later and bring that plan "up-to-date" by determining the location of any of the above noted items and/or others and making the necessary Registry Office search to ascertain any changes in instrument numbers, easements acquired, etc. Other surveys are only up-to-date if they meet the requirements of the Association Standards and have been so certified by an Ontario Land Surveyor.

Unfortunately, many of the old documents cannot be brought "up-to-date" and require a new plan prepared. Many were not full plans of survey, but rather "limited use documents". These limited use documents are no longer prepared by members of the Association due to their misuse. The Association has also been required to take a stand in that it will not condone its members giving out prints of old surveys for use today. Many arguments have been received from members of the legal profession; the main one being that the surveyor has no liability in giving out the plan and that he should not consider himself

having any responsibility by either giving or selling a print of the plan, as the mortgage company will accept the plan. We find this difficult to accept as the surveyor is acting as the agent who certifies extent of title. Both the purchaser and the mortgage company must be served equally.

The surveyor does not feel that in order to save the purchaser the cost of a survey the mortgage company can have an inadequate document provided by the surveyor for their use. Our discussions with the Canadian Bankers' Association, the Canadian Trust Companies and the Credit Unions, have all reaffirmed that at the management level of these associations, the companies want assurance that if they foreclose there will be no problems. The surveyor, in all good conscience, cannot provide an outdated survey to be misused today. We cannot accept the argument that the acceptance of an old survey by the mortgage company wipes out any responsibility or liability we may have. It is not enough to state the document is old, rather one must put the mortgage company and purchaser on notice of what precisely is lacking from the document. Any less would appear to be a shirking of professional responsibility.

CONCLUSION

It is obvious to those who have been practising in real estate that the awareness has changed regarding surveys. The Ontario Land Surveyor is recognizing his responsibility in not providing documents which may be misused by the non-surveyor. Our recently adopted Standards, which are mandatory, clearly outline what has to be shown on a plan of survey. A report must accompany each and every survey and this can only be of benefit to the surveyor and the lawyer with whom he deals. Unfortunately, we have to overcome the misunderstandings and misuse of our documents which have developed over the past years. Both surveyors and lawyers find it hard to change practice, however we must remember that we no longer can rely on privity of contract to restrict our liability and the government is ever-vigilant regarding our responsibilities to our clients and the public at large. Taking all these aspects into consideration it is gratifying that our two professions are now carrying on a series of discussions and seminars regarding our joint efforts in the real estate transaction.