

Liability of Surveyors for Mortgage Surveys

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INTRODUCTION

In comparison to accountants, engineers and lawyers, limited case law exists examining the professional liability of land surveyors. Whether that is due to fewer errors made by land surveyors than by other professionals or other factors is not easily answered. Nevertheless, land surveyors face similar liability issues as other professionals. As with other professionals, land surveyors face liability in both contract and tort.

The authorities demonstrate that it is important for a land surveyor to determine and clarify the purpose of the survey with the client upon being retained

Land surveyors regularly perform survey work for clients in the form of a mortgage survey or a building location certificate. A mortgage survey may be requested by the financing institution, by the solicitor for the purchaser or the financing institution, or by the purchaser itself. While instructions to the surveyor may vary depending on the circumstances, the usual intent of a mortgage survey is to provide assurance or security to the financing institution that the principal buildings for which the funds are being loaned lie on the property being purchased.

The authorities demonstrate that it is important for a land surveyor to determine and clarify the purpose of the survey with the client upon being retained to provide services. It also prevents exposure to liability if the land surveyor expresses the purpose of the survey in the form of a limitation or exclusion clause on the face of the survey certificate. In the recent British Columbia Supreme Court decision in *Petersen v. Power*.¹ The Court upheld these estab-

lished principles and confirmed that the purpose of the survey and the reliance by the client are significant factors in determining liability. This article reviews this recent case, and considers some implications for land surveyors and professionals generally.

FACTS OF CASE

In *Petersen*, the plaintiff made allegations against a land surveyor, claiming that the surveyor negligently prepared a mortgage survey certificate, which negligence caused her to suffer damages. The allegations related to the purchase of a campground property, with the plaintiff stating that the preparation of the survey certificate was negligent in failing to show certain portions of buildings that were encroaching on neighbouring property and in failing to show the location of improvements such as recreational vehicle parking stalls and attached services on the survey certificate. The case also involved a claim against the vendors of the campground property for breach of contract and negligent misrepresentation.

The facts can be briefly summarized as follows: In the spring of 1993, a series of offers and counter offers were made and an agreement was reached for the plaintiff to purchase the campground property. In the process of negotiating the transaction, the plaintiff instructed her solicitor that she was obtaining mortgage financing through the Federal Business Development Bank (the "Bank"). Instructions to prepare a mortgage were forwarded to the plaintiff's solicitor from the Bank. The plaintiff's solicitor sent a fax to the defendant land surveyor asking them to provide the necessary document to meet the Bank's survey requirement. The request attached the Bank's detailed survey requirement asking the surveyor to show the location of buildings in relation to the property boundary. The survey crew attended at the camp-

ground, and completed the survey work required to prepare a building location certificate. Ultimately, a survey certificate was prepared and forwarded to the plaintiff's solicitor. The survey certificate contained the express disclaimer: "This plan is to be used for mortgage purposes and is not to be used to define property boundaries."

Notwithstanding this disclaimer, the plaintiff claimed that she relied on the survey certificate in deciding whether or not to complete the transaction. However, evidence showed the reality was that the plaintiff executed the Contract of Purchase and Sale prior to even requesting the survey, and the plaintiff did not observe the survey certificate until after the closing of the transaction.

Approximately one year later, a neighbour advised the plaintiff that structures on the campground property were encroaching on the property to the north. The survey crew returned to the campground property, and it was discovered that there had been an error in the preparation of the initial survey certificate.

Additional encroachments were also found on the south property boundary, some due to an apparent miscommunication between the plaintiff and the survey crew, as well as other structures that were not shown on the first survey certificate since they were not considered to be buildings.

The central issue in respect of the allegations against the surveyor was whether there was any reliance by the plaintiff, and if so, whether there was reasonable reliance on the survey certificate for the purpose on which it was prepared.

DECISION OF THE COURT

The Court found that the sole purpose of the plaintiff's solicitor making the request was to satisfy the mortgage survey requirement of the Bank. No specific instructions were given by the plaintiff

or its solicitor for the surveyor to undertake any investigation to ensure that the various improvements comprised in the campground were all located within the boundaries within the property she was purchasing.

In terms of the issue of reliance, the Court found that the plaintiff executed the Contract of Purchase and Sale prior to her solicitor even receiving a copy of the survey certificate. Further, although the plaintiff's solicitor gave a general description of the contents of the survey certificate to her, the plaintiff did not even review the survey certificate until after the registration of the conveyance closing the transaction.

“...the Court held that the disclaimer on the survey certificate was a complete defence to the plaintiff's claim...”

The main basis for the plaintiff's claim against the surveyor was that she would not have completed the transaction purchasing the campground property if the survey certificate had been properly completed in 1993. Since there was no reliance on the survey certificate in executing the Contract of Purchase of Sale, nor in closing the transaction, the Court was satisfied that the plaintiff would have completed the transaction even if the survey certificate had been properly completed. The Court held that there could be no liability since there was no actual reliance by the plaintiff.

In addition, the Court held that the disclaimer on the survey certificate was a complete defence to the plaintiff's claim against the surveyor. The surveyor was asked for a survey certificate which met the survey requirement of the Bank, and that is what the surveyor prepared. The surveyor did not prepare a document that was intended to be relied upon for any purpose other than in satisfying the Bank's survey requirement so that the plaintiff could obtain her mortgage financing. The plaintiff obtained that mortgage financing, and there was no evidence for the Court that the plaintiff's financing arrangements with the Bank were then, or now, in any jeopardy on account of any errors in the initial survey certificate.

Thus, while it was determined by the Court that the surveyor was negligent to some degree in the preparation of the initial survey certificate, the Court held that the negligence caused no loss or damage to the plaintiff in that no such loss or damage flowed from the proper, authorized use of the survey certificate. The claim against the surveyor was therefore dismissed.

IMPLICATIONS OF THE DECISION FOR LAND SURVEYORS AND OTHER PROFESSIONALS

The decision in *Petersen* does not make any new law. The principle that reports prepared by professionals can only be relied upon for the purpose for which they are prepared was entrenched by the Supreme Court of Canada in *Hercules Management Ltd. v Ernst & Young*.² That

case involved allegations of negligent misrepresentation in the preparation of auditors reports, but the principles are applicable to all professionals.

The two main elements that arise from the decision in *Petersen* evolve from the principle of reliance. First, there must be reasonable reliance by the party claiming to rely upon the report or certificate. Second, the report or certificate must be relied upon by the client or a third party for the purpose for which it was prepared. In other words, the client or a third party cannot rely upon a report for a different basis subsequent to the report being prepared for a specific purpose.

The importance of expressing and clarifying the purpose of a report or certificate should be stressed to the land surveyors and to other professionals. The purpose may be clarified in terms of engagement contract, simply confirmed in a letter, or may be placed on the face of a report or certificate. As the decision in *Peterson v. Power* demonstrates, an express limitation or disclaimer on the disclaimer on the face of a survey certificate may be a complete defense to a claim. The risk of liability will obviously increase if the purpose for which the report or certificate was prepared is not made clear to the client or third parties.

It should be noted that the case Peterson v. Power is currently under appeal.

1. *Unreported, December 1, 1997, Nelson Registry, No. 5905*
2. *[1997] 2 S.C.R.165*



Sites to See

The following is a list of web sites that you may find useful and interesting.

Remember - Check the Association's website link page. Every effort has been made to ensure that the addresses are up-to-date and correct.

If your firm's web site is not listed here and you would like to it be, please contact the Association office.

Cyber Listings Real Estate Network

<http://www.allsurveyors.com>

Eagle Point Software

<http://www.eaglepoint.com>

OACETT

<http://www.oacett.org>

Global Positioning Systems

<http://www.wp.com/gpsnet>

Geomatics Canada Quick List

<http://www.crs.emr.ca/linc/misc/quicke.html>

Association of Ontario Land Surveyors

<http://www.interlog.com/~aols>

Canadian Council of Land Surveyors

<http://www.interlog.com/~ccls/home.html>