GEOMATICS AND THE LAW: Unscrambling the Egg

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Among the concerns faced by associations of professional land surveyors in Canada is the increased activity of title insurance companies in recent years. Although a fixture for very many decades in the United States, such companies or their subsidiaries that offer title insurance in this country may be regarded by some extremists as unwelcome carpetbaggers who should be run out of town. Even an American commentator has sarcastically accused title insurance companies of "insuring against everything but loss." But whatever may be the advantages and disadvantages of title insurance as a service to prospective purchasers, land surveyor associations have a responsibility to alert the public to the unfortunate consequences that can flow from the failure to have a survey made before land is acquired. The Ontario case of *Holmes v. Walker* (1997), 35 O.R. (3d) 699 is a cautionary tale very much in point.

On April 11, 1989, Mrs. Holmes entered into an agreement with Mr. Walker to purchase for $170 000 a parcel of land containing a cottage, fronting on Lake Huron in Saugeen Township (now the Town of Saugeen Shores), Bruce County. The agreement, which provided for the transaction to close on July 7, gave Holmes one month to examine the title. It stated that, if requested by the purchaser, the vendor would deliver to her any survey plan of the property in his possession or within his control, but it also stated that if there was no such plan the purchaser could not call upon the vendor to produce one.

In reply to an inquiry from Holmes's lawyer as to whether the cottage and property complied with all municipal building and zoning laws, the Township replied that without a survey the question could not be answered, but in the Township's opinion the lot did not appear to comply with the current zoning requirements regarding lot area, frontage and depth.

On June 13, Holmes's lawyer requisitioned from Walker's lawyer the production of a survey plan showing that the cottage was situated wholly within the parcel limits. A week later he received a reply that no survey plan was available. On July 6, the day before closing, Walker signed a statutory declaration which stated in part that

To the best of my knowledge and belief the buildings used in connection with the premises are situate wholly within the limits of the lands above described...

Although Holmes's lawyer requested this declaration, there was no evidence that he had discussed with her the need for a survey, nor did she obtain one before the closing date. Both parties to the case agreed that Walker signed the declaration in good faith and was entirely ignorant of its inaccuracy respecting the cottage location.

In July 1993, four years after her purchase of the parcel, Holmes had a survey made of it. The survey plan showed that although one small corner of the cottage lay on the land she had bought (Lot 42, Registered Plan No. 332), the rest of it was situated on the 66 feet-wide township road allowance along the lake shore. The existing building could not be moved because of its age, and it might not be possible for a new cottage of the same size to be built on the land actually purchased. Although the Township refused to sell to Holmes the portion of road allowance beneath the cottage, it offered to give her an occupation licence in exchange for an annual payment of $25. The licence, however, would not permit Holmes to rebuild the cottage if it became destroyed, and would even prevent her from repairing it or making renovations or additions to it.

Holmes based her case against Walker entirely on the grounds that the location of the cottage on the road allowance, instead of on the land she bought from him, constituted an error in *substantialibus* and that the contract for purchase should be rescinded.

Mr. Justice Campbell of the Ontario Court (General Division) explained that error *in substantialibus* does not merely mean substantial error. It means that the buyer and seller made a mistake about some fundamental quality of the thing that was sold. As an example, not given by the court, the purchaser of a parcel who subsequently discovers that it contains only 10 ha, whereas its area stated in the agreement for sale was 14 ha, might well regard the difference in area as substantial. But provided both seller and purchaser had the same parcel in mind at the time of their agreement, and provided the seller did not fraudulently misrepresent the area, the purchaser's remedy would normally be to seek an abatement of the purchase price, especially if that price had been based on a specified amount per hectare. In other words, the purchaser would probably not be able to successfully claim an error *in substantialibus* and obtain rescission of the contract.

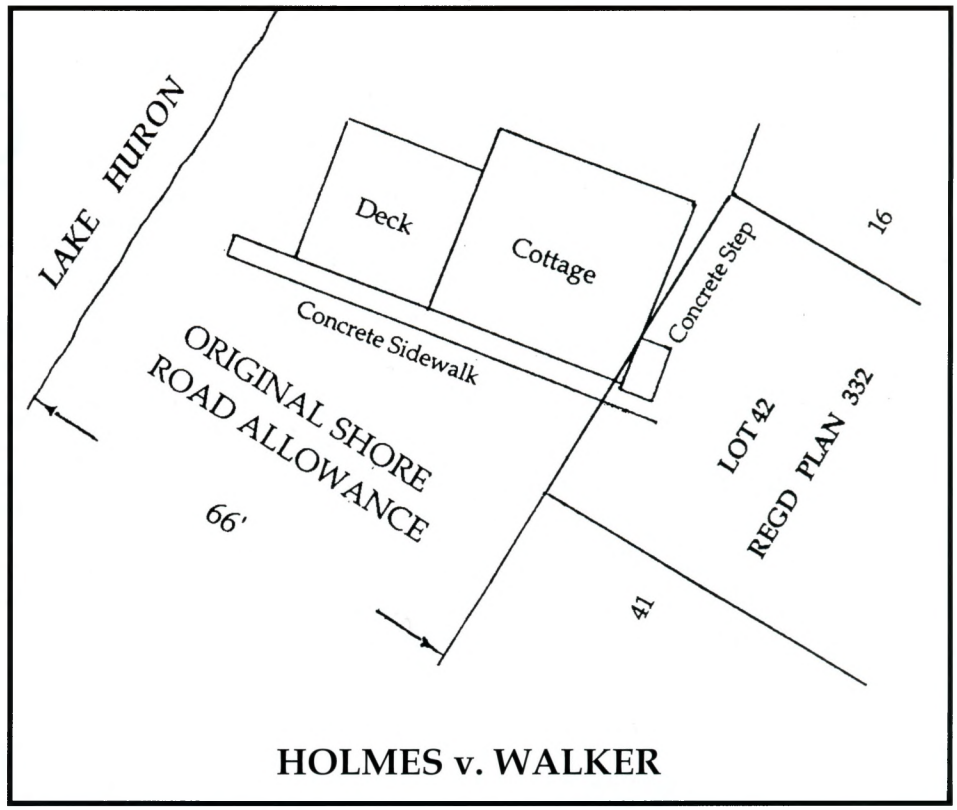
But, in the court's opinion, the contract between Holmes and Walker clearly represented an error *in substantialibus*. Holmes thought she was buying, and Walker thought he was selling, a piece of land with a cottage on it. In fact, Holmes bought from Walker a piece of land without the cottage. The fundamental error concerned ownership of the cottage, the very thing that Holmes wanted to buy.

The aim of rescission is to restore the parties, as far "as practically just" to their original positions, but the court pointed out that rescission is not an automatic remedy even where an error *in substantialibus is proved. Where two parties act in good faith, a court must weigh the equities and*

exercise its discretion regarding their entitlement to relief from the consequences of their common mistake.

In weighing the relevant factors in favour of rescission, the court said that if it were not granted Walker would retain the benefit of selling something he did not own. But weighing more heavily against rescission were the facts that (1) Holmes caused the problem by failing to get a survey before the closing date when it "was such an obvious, easy and prudent thing to do:' (2) by failing to obtain the survey, Holmes assumed the risk that she now sought to shift to Walker, (3) Holmes delayed in obtaining the survey and bringing the action against Walker, (4) "unscrambling the egg" would cause difficulty, expense and further delay, (5) it would be unfair to Walker, after believing for years that the sale was final, to suddenly visit him with the consequences of Holmes's failure to have a survey made before closing, (6) Holmes can keep, use and enjoy the cottage by paying the Township $25 per year for the licence of occupation, even though she would not have the full legal incidents of ownership, and (7) there is a strong public interest in the finality of property transactions, which means that rescission should not be lightly granted "lest the bright line disappear between sales that am final and sales that are subject to reversal years later."

In dismissing the action against Walker, the court therefore held Holmes not entitled to rescission, despite the existence of an error *in substantialibus.* Holmes appealed the judge's order to the Court of Appeal for Ontario. *In Holmes v. Walker* (1998) 41 O.R. (3d) 160, Chief Justice McMurtry, speaking on behalf of the appellate court, showed himself to be a man of few words, for his one-paragraph judgment contains only 82 of them. He found that the trial judge had made no error of principle in the exercise of his discretion, and that the "key factor in deciding not to grant rescission was the appellant's failure to obtain a survey prior to closing." The appeal was dismissed, with costs fixed at $2,000. Before the trial began, the hapless Mrs. Holmes brought a separate action against her lawyer in which she claimed damages arising out of the property transaction. Counsel for both parties to the action agreed to postpone the filing of a statement of defence, pending the outcome of the present case.



HOLMES v. WALKER