What Is a Survey?

LITTLE KNOWN CASE ANSWERS COMMON QUESTION

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John and Mary Pilarczyk, Plaintiffs, vs. Masolin & Borean, Defendants Ontario Provincial Court - Civil Division. Etobicoke Small Claims Court;Action No. 16160/86; Lamb Prov. Ct. J. - January 21, 1988.

An agreement of purchase and sale obligated the vendor to supply the purchaser with a "survey." The vendor gave the purchaser a sketch. The purchaser sued the vendor for the costs of a survey of the property.

HELD: The action was allowed. The agreement clearly required the vendor to supply a survey. That requirement survived closing and the purchasers were entitled to insist on it. A "survey" in the context of a formal Agreement of Purchase and Sale means a survey prepared and signed by a qualified Ontario Land Surveyor registered under *The Surveyors Act*, with a date and all the required details and identification marks.

C. Weiler, for the plaintiffs.

Erika Borean, for the defendants.

LAMB PROV. CT. J.:— The plaintiffs in this action, are claiming reimbursement from the defendants for the cost of a plan of survey, of property which the plaintiffs had purchased from the defendants.

An Agreement of Purchase and Sale dated April 12th, 1986 had been accepted by the defendant vendors on the 14th of April, 1986 and was produced and admitted as "Exhibit No.1."

"The purchaser sued the vendor for the costs of a survey of the property."

This Agreement was in the standard form and its contents are not in dispute. The Agreement had been initially prepared by the vendors' agent. The defendant, Erika Borean, who gave most of the evidence on behalf of the defendants admitted that they had all studied the Agreement thoroughly and had gone over its terms with their agent very carefully. The Agreement itself indicates that a number of changes were made to the Agreement prior to it being acceptable to all the parties.

The Agreement was subject to two conditions which are not, however, relevant to this dispute. In that area of the standard agreement reserved for what might be called "special provisions" the following clause appeared:

"The vendor agrees to supply a survey of the subject property, on or before closing."

The words "indicating the location of the dwelling at his own expense" had been struck out and initialled by the parties. Since the property was not built on, the deletion of the reference to a dwelling was understandable.

There might be some question whether the deletion of the words "at his own expense" evinced some thought on the part of the vendors that they were not to be responsible for any costs in connection with a survey, but there was no evidence that survey costs were discussed or even mentioned. This could have been because the defendants were under the impression, erroneously as I find, that the sketch later produced was in fact a survey.

The Court was however left to consider the words indicated as part of the agreement between the parties. The question to be determined was "what is the meaning to be accorded to the words: 'to supply a survey of the subject property'?"

The Court did not have the benefit of any evidence from either the agent or the solicitor for the vendors as to any discus-

sion concerning the vendors' understanding as to their obligations in this regard.

The vendors argued that they had in their possession a photostatic copy of a "sketch" which was produced at trial and admitted as "Exhibit No.2." This sketch which was turned over to their (the vendors') lawyer after the Agreement had been signed was, in their submission, their only obligation under the terms of the Agreement.

Paragraph 10 of the Agreement provides that:

"The purchaser shall not call for the production of any deed, abstract, survey or other evidence of title to the property except such as are in the possession or control of the vendor. Vendor agrees that if requested by the purchaser, he will deliver any sketch or survey of the property in his possession or within his control to the purchaser as soon as possible and prior to the last day allowed for examining title."

"The evidence of the surveyor clearly demonstrated that any survey involves the examination and assessment of all documents..."

This provision clearly obligated the vendors to deliver to the purchaser the "sketch" separate and apart from the obligation "to supply a survey," on or before closing, which was a special clause inserted on the front page of the Agreement. The vendors at trial also seemed to be under the impression that, because some use may have been made of the sketch by the surveyor in preparing the survey made after the closing, the sketch was something more than it was. The evidence of the surveyor clearly demonstrated that any survey involves the examination and assessment of all documents, agreements or sketches etc. which, however imperfect or incomplete, might possibly have some bearing on the extent of title to the property to which the survey has reference.

The court did have benefit of the oral evidence of Mr. R.E. Clipsham, a consulting engineer and a qualified Ontario Land Surveyor, whose firm and under whose supervision what he described as a "Plan of Survey" was prepared and produced as "Exhibit #6." Mr. Clipsham's testimony was that under no circumstances could the "sketch" produced by the defendants be considered a "survey" by the survey profession. He gave a number of reasons for this opinion among which were, no indication of the originator of the "sketch," no references to the location or municipality, no date, and completely lacking in the kind of important and necessary information which a survey must contain. Mr. Clipsham was asked for his opinion as to what the sketch was or where it had come from. He ventured the opinion that the sketch might be a photocopy of a segment of a document which had been filed in the Registry Office in connection with the severing of a larger piece of property in accordance with the requirements of the Planning Act since a number of component pieces depicted indicated that they were approximately 10 acres in area. The main point of Mr. Clipsham's evidence was that a "plan of survey" or simply "a survey" is what visually represents, as far as possible, the results of a complete investigation of a subject property with respect to matters such as "deed" as opposed to "measured" distances, easements, topographical features etc. I concluded that if the plaintiffs had, at any time, agreed to accept, or acknowledged that the sketch produced and forwarded by the defendants' lawyer with his letter dated May 16, 1986 was a survey, evidence would have been called to this effect. There was no evidence of where the defendants had obtained the sketch or that they had received any competent advice as to what they had. It might, for instance, have been of interest to the Court as to what reference, if any, had been made to this "sketch" by the defendants' lawyers in their reporting letter when the defendants purchased the property originally. Again, in the absence of any such evidence, the Court has to rely on the Agreement itself.

In addition to the evidence of Mr. Clipsham, I had the assistance of a number of special lectures which were delivered under the auspices of the committee on continuing education of The Canadian Bar Association, and printed and released for the assistance of the legal profession. [Footnote: "Surveys..the ticking time bombs." Special Lectures Canadian Bar Association May, 1987.]

While one should be reluctant to impart what might, in certain circumstance, be considered "technical definitions" to contractual language in an effort to determine what the parties meant, an Agreement of this kind is by its very nature a document which deals with matters of a technical or legalistic nature. It has been observed, on a number of instances, that almost every provision of the standard Agreement has been derived over the years from much judicial honing, as well as statutory enlightenment. There have been many instances, from time to time, of concerted efforts by the real estate industry and the Bar to ensure, as far as possible, the fairness of the standard terms of the agreement for both sides. The purchase or sale of real property is, for the vast majority of the public, among the most important transactions of their lives. It would seem only reasonable that, any doubt as to the meaning of any of the terms of such an agreement in the minds of either party, has to be resolved by resort to the advice and opinion of their lawyer at the time.

"The tracing or photocopying of sketches... cannot be considered 'surveys...'"

In this instance, since the obligations were clearly that of the vendors, if there was any doubt in their minds as to what was meant by the word "survey" they had a clear duty to obtain the advice and opinion of their legal advisor prior to the Agreement being signed.

The Surveys Act R.S.O. 1980 chap. 493 provides that:

"No survey of land for the purpose of

finding, 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."

A "surveyor" is defined as a person who is an Ontario Land Surveyor registered under the Surveyors Act.

The tracing or photocopying of sketches or the compilation of parts of documents, which might appear to have been prepared by persons with some knowledge of drafting techniques, whether such documents have been attached to registered or other legal appearing documents, cannot be considered "surveys" in circumstances such as were present in this case. The essence of a survey is that it must bear the "imprimatur" of a registered surveyor, in all respects, to indicate to the observer that he can assume ascertainable principles have been followed in the survey's preparation with reference to the specific property investigated. Any given survey may contain information which may have implications for adjacent property and yet, cannot by any stretch of the imagination, be considered "a survey" of such adjacent property. Since in effect a survey is, as has been said, "a slice of time" the date the survey was made is of the utmost importance. There was some evidence in this action that the "sketch" was an excerpt from a document which may have been produced over 20 years ago.

The failure of the "sketch" provided by the defendants to be considered a survey was drawn to the attention of the defendants' solicitor prior to closing. The plaintiffs did not give up their right to obtain a survey from the defendants but elected to proceed with the closing of the transaction. The letter delivered by the purchasers' lawyer, on closing, made his position abundantly clear. (Exhibit No.5). While it might be argued, that the plaintiffs gave up any right to sue for specific performance with an abatement of the purchase price owing to any deficiencies that the survey obtained might have revealed, they did not give up their right to receive a survey or reimbursement for the cost of the survey which was obtained after the closing.

The possible consequences of closing a real estate purchase under the circumstances as they existed here, could have been exceedingly serious had the survey obtained after closing revealed, for example, that the subject property had been previously transferred without compliance with the Planning Act insofar as area requirements were concerned. There was some question raised by the defendants as to the fee which was paid for the survey by the plaintiffs. Considering the quantity of land involved, its location etc. and the evidence of Mr. Clipsham, I have no reason to believe that the fee itself was in any way unreasonable. The defendants did question the disbursements which could be attributable, in part, to that part of the survey relating to the locating of a foundation built on the property subsequent to the purchase. Apportioning the disbursements on a pro rata basis would reduce the Plaintiff's claim by $12.25.

In giving judgment for the plaintiffs I summarize my reasons for so doing as follows:

1. The Agreement between the parties obligated the defendants to supply a "survey."
2. A "survey" in the context of a formal Agreement of Purchase and Sale means a survey prepared and signed by a qualified Ontario Land Surveyor registered under *The Surveyors Act.*
3. The obligation to supply a survey did not merge with the closing of the transaction.
4. At no time did the purchasers waive their right to be provided with a survey by the vendors. If there was any doubt of this, the letter delivered by the purchasers' lawyer on closing, clearly set out the purchasers' position.
5. Since the purchasers were entitled to receive a survey, which the vendors refused to supply, the purchasers were entitled to have a survey prepared at the vendors' expense.
6. The steps taken to obtain the survey and the cost incurred were reasonable.

There will be judgment therefore for the plaintiffs for the sum of $1,173.45 plus Court costs plus counsel, preparation and witness fees of $288.00.

Sites to See

The following is a list of web sites from the A.O.L.S. or related organizations. 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 would like to be, please contact the Association office:

Department of Geodesy and Geomatics Engineering
University of New Brunswick
www.unb.ca/GCE/

Historical Maps of Canada
www.sscl.uwo.ca/assoc/acml/faclist.html

EarthRISE Topographical World Map
earthrise.sdsc.edu/cgi-bin/er/topoSearch

Live Weather Images
www.geocities.com/SunsetStrip/7033/weather.html

Historical Atlas of Canada
www.geog.utoronto.ca/hacddp/hacpage.html

US Geological Survey Declassified
Intelligence Satellite Photographs
edcwww.cr.usgs.gov/dclass/dclass.html

The Bosnian Virtual Fieldtrip
geog.gmu.edu/gess/jwc/bosnia/bosnia.html

Our Home, The Atlas of Canadian Communities!
ellesmere.ccm.emr.ca/ourhome/

National Atlas on SchoolNet
www-nais.ccm.emr.ca/schoolnet/

Map Joke Contest
www.philaprintshop.com/humstr.html