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PURCHASE OF TITLE INSURANCE A BUYER'S ISSUE: SELLERS' CLAIM AGAINST LAWYER FOR FAILING TO ADVISE OF INSURANCE PURCHASE DISMISSED

By Jane Sirdevan and Stephen Thiele

The dispute resolution group of Gardiner Roberts LLP has often represented lawyers in title insurance disputes. In most cases, we have been asked to ensure that title insurers are properly bearing the expense of defence costs where lawyers have been sued for negligence in connection with title problems arising out of real estate transactions and title insurance coverage has been purchased. In those cases, the title insurers generally allege that the respective claims are not covered under their title insurance policies and therefore they are not required to pay the defence costs incurred by the lawyers.

In a recent case, however, we were asked to defend a lawyer and the Lawyer's Professional Indemnity Company ("LPIC") against a vendor's third party claim for damages and contribution and indemnity where the lawyer, acting for both the purchasers and vendors, failed to tell the vendors that the purchasers were buying title insurance and a costly title defect was ultimately discovered and remedied.

The Relevant Facts

In *Charaniya v. Loyer*¹ a lawyer had been retained by both the buyers and the sellers to transfer title of a residential home. During the course of the transaction, the buyer decided to obtain title insurance. Accordingly, the lawyer did not conduct title or off-title searches to determine if there were any title defects.

The lawyer also did not advise the sellers of the buyers' decision to purchase title insurance.

The sellers claimed that the failure of the lawyer to tell them about the buyers' decision to purchase title insurance was negligent because the lawyer represented both parties and thus had a duty to tell them what the buyers' had decided to do. The sellers submitted that if they had known the buyers were purchasing title insurance, they would have instructed the lawyer to conduct the necessary title and off-title searches normally done by a lawyer for purchasers in a real estate transaction and would have obtained an up to date survey that would have disclosed the title defect ultimately remedied by the title insurer for the buyers at significant expense.

The sellers also argued that LPIC was potentially liable for any claim against them in the main action on the grounds that the sale of title insurance to the buyers induced the buyers to breach a provision of the Agreement of Purchase and Sale (the "APS"). In essence, the sellers contended that the purchase of title insurance caused the buyers to forego making requisitions concerning title defects that would in turn have permitted the sellers to contractually terminate the sale.

Our Argument

On behalf of LPIC and the lawyer, we argued that there was, and could be, no inducement to breach the APS and that the lawyer,

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A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.

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notwithstanding his representation of both sides in the real estate transaction, did not owe the sellers a duty to advise them of the buyers' decision to purchase title insurance.

The Court agreed with our arguments.

Court's Conclusions

With respect to the allegations made against the lawyer, the Court explained that there was no authority for the proposition that a lawyer breached his or her duty of care to a client by arranging for the purchase of title insurance in lieu of conducting searches, making inquiries and ordering an up to date survey. In fact, the judge recognized that the governing body for lawyers explicitly condoned this method of fulfilling the duty owed to the purchaser of property.²

The lawyer also did not owe a duty to the vendors to warn them that the buyers were purchasing title insurance in lieu of obtaining a title opinion. The Court accepted that the law in connection with the duty to advise or warn vendors when the lawyer was retained by opposite parties in a real estate transaction was confined to only disclosing "material facts".³

In the circumstances, the facts failed to disclose that the vendors were relying on the lawyer to provide the purchasers with a title opinion. The Court also found that there was no authority for the proposition that a lawyer's duty to the vendors to properly represent their interests included a duty to disclose or warn of the risks of instructions to opt out of an opinion on title.

With respect to the claim for inducing breach of contract, the Court found that there was no authority for the proposition that a contractual right for the benefit of the purchaser created a corresponding right available to the vendor and that inducement required contractual obligation.⁴

Under paragraph 10 of the APS, the vendors contended that the process contained therein

would have permitted them the opportunity to terminate the sale if it had been followed and title insurance had not been purchased. This was a specific contractual right that was deliberately interfered with to their detriment.

But the Court found that paragraph 10 of the APS was the standard term which provided the buyers, to their benefit, the right to make inquiries and searches respecting title. The buyers were entitled to waive a term of a contract which was meant to be for their benefit and this is exactly what happened in the case.⁵

Without a breach of contract there could be no inducement to breach the APS. Accordingly this aspect of the claim was also dismissed against LPIC and the lawyer.

Representation by GR

The lawyer and LPIC were represented by Jane Sirdevan. This was decided on a motion to dismiss the sellers' third party action against them under both rules 20 and 21 of the *Rules of Civil Procedure*.

Jane was assisted in the preparation of the legal argument and the writing of the factum used on the motion by the firm's Director of Legal Research, Stephen Thiele.

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1. June 1, 2016, Ontario Court File No. C-1968-12-A1, Justice Hennessy
 2. at para. 44
 3. at para. 49
 4. at para. 30
 5. at para. 32

