CONVEYANCING

LECTURE ON 25 JUNE 2007

Note: Students should read the Chapters in Lang & Skapinker and the cases referred to in the Guide. These notes are NOT a substitute for reading the text and considering the cases.

Survey certificates

The first and primary obligation of a solicitor is to ensure that a client is acquiring what the client expects. As we have considered previously, this does not extend to the quality of the property but it does extend to the title to the whole of the land being purchased.

The first matter to consider is how do you do this?

The essential element in ascertaining whether the property being acquired is the correct property, that there are no encroachments either by the property onto adjoining properties or by the adjoining property onto the property, is by using a survey report or certificate.

These certificates can be described as either ‘survey reports’, ‘survey certificates’ or ‘identification surveys’. They are all the same thing. They are not ‘peg surveys’. While an identification survey will have a written report with a plan showing the boundaries of the property, the location of the improvements and any other matters the surveyor notes concerning the property including, whether the property appears to comply with the terms of any restrictive covenants, a peg survey indicates the location of pegs that have been placed at the corners of the property and sometimes ‘line ‘pegs in long boundaries or boundaries where it is difficult to see from one end to the other.

Common matters disclosed in a survey are:

• street address for the property

• lot number and deposited plan number

• the distances of improvements from the street and side boundaries, including the distance of gutters from side boundaries
• a plan of the buildings and any other improvements including their location on the land. The plans are drawn to scale but buildings would normally be measured for location purposes, the survey is not measuring for the purpose of construction. Some approximation may be evident.

• location of boundary fences

• location of retaining walls and some indication of their construction (e.g. ‘timber retaining wall’ or ‘brick retaining wall’)

• whether the buildings appear to comply with any restrictive covenant

• any other matter that appears to be relevant to the surveyor.

If the location of sewer mains or other matters are of importance, then they should be brought to the attention of the surveyor so they can be investigated when the surveyor is on site.

Driveway widths can be important and in appropriate cases should be checked by the surveyor, particularly where there is doubt concerning whether a dividing fence is on the correct alignment. If a fence is on adjoining property, sometimes only by a small distance, the driveway width could be reduced by a new fence on the correct alignment.

Vendor disclosure

There is no requirement in the Regulation to attach a survey report to the contract. This issue was the subject of much discussion when the regulation was first introduced. The requirement to attach searches, a planning certificate and a sewer mains diagram would be complete if the vendor also had to attach a survey report. The prevailing view, for whatever reason, was that this was too onerous on a vendor, and it was not introduced.

The Regulation does provide that a contract cannot preclude a purchaser from raising an objection, requisition or claim that ‘the purchaser would otherwise be able to make’ in respect of encroachments by or upon the land. This prevents a vendor requiring a purchaser to accept a property where there are encroachments known to the vendor but not disclosed in the contract. It also prevents a vendor from choosing not to discover encroachments but contracting out of any liability.

I discussed last week how such a disclosure clause might be worded and an example could be:
Attached marked “A” is a copy of a survey dated * of * disclosing that:

(a) the dwelling on the land is 0.5 metres from the north western boundary and does not comply with the minimum distance requirements of Council;

(b) the garage erected on the land encroaches on to the adjoining land by between 0.03 and 0.1 metres;

(c) a shed erected on the land adjoining to the south west encroaches onto the land by up to 0.12 metres

The purchaser acknowledges these disclosures and will not be entitled to raise a requisition or objection, make a claim for compensation, or delay or refuse to complete because of any of these matters.

Any clause to disclose encroachments must be specific and will only prevent requisitions, objections or claims relating to the matters disclosed. If other matters become apparent then the clause will not operate in respect of those matters.

**The contract**

Clause 10 lists matters about which a purchaser cannot make a requisition or claim.

10.1.1 deals with the ownership or location of dividing fences,

10.1.3 deals with party walls

10.1.8 deals with easements and restrictions on use and non compliance.

All of these matters cannot be the subject of a requisition or claim and it is important for a purchaser to ensure that any matter is known about. For example, if dividing fences are close to the correct boundary there may be no issue, but at what point does a deviation from the correct line become important? This is an issue for the purchaser and should be the subject of instructions.

I mentioned above the width of driveways. In closely developed areas it is not uncommon for driveways to be wide enough for small cars but not wide enough for larger vehicles or 4 wheel drives. While a purchaser may accept this if the property has every other feature, it is important that the fence is in the correct position and does not encroach onto the adjoining land. In some cases a minor change to the position of the fence can mean the difference between vehicle access and no access.
Many deposited plans will show terrace houses and whether the walls are party walls or separate walls abutting each other. The difference is important. Separate walls means that there is no need for cross easements for support in the wall, while party walls should be protected by cross easements. Cross easements can be created by transfers granting easements, by registration of a plan and an 88B instrument or by the operation of section 181B of the Conveyancing Act.

The compliance with easements or restrictions on use can be discovered by survey or by survey coupled with further investigation. If an easement crosses land, other than adjacent to a boundary, the position of it in relation to the improvements is critical. Do any of the improvements encroach onto the site of the easement? Do the gutters attached to any improvements encroach into the airspace above the easement?

If any of these matters are discovered then appropriate advice should be given to the client and instructions taken.

For non compliances with distances from streets and boundaries, the best method of ensuring that no problem arises in the future is to obtain a Building Certificate under section 149 of the Environmental Planning and Assessment Act 1979. It is important to differentiate between the various 149 sections.

149 The section under which a council issues certificates setting out the matters relating to the land as prescribed in the regulations – a planning certificate

149A The section authorising a council to issue a building certificate under sections 149B – 149E – a building certificate.

149E The section that sets out the effect of a building certificate.

When do you obtain a survey report?

This has two parts:

• in what circumstances do you obtain a survey report; and

• at what time do you obtain the report.

My practice is to try and convince every purchaser client that a survey should be obtained together with a building certificate. If the contract attaches a survey that is reasonably recent and no improvements have been carried out since the date of the survey, then a declaration from the vendor to that effect annexing a copy of the survey probably suffices.
Solicitors practise in this area varies considerably and there is no one rule that always applies. Given that a matter relating to survey, unless there is an encroachment by or upon the land, will not amount to a defect in title, it is important to establish these matters prior to exchange of contracts.

I would always obtain a survey, or obtain written instructions not to obtain one, wherever there is no survey attached to the contract and the vendor advises that there is no survey available. There is a tendency to assume that improvements must be in the correct position but as we will see in *Svanosio v McNamara* this is not an assumption one can safely make.

Old system and limited titles pose their own risks and require a survey not only to ensure that improvements are properly located but that the land described in the conveyance is all available for conveyance to the purchaser. While the failure of the abstract to disclose that all the land is available might amount to a defect in title (see earlier lectures) why wait until the transaction is well under way before finding out about this.

If there is no survey I would always obtain one prior to exchange. If an agent has exchanged, then I would try and obtain the survey during the cooling-off period. If this became impossible then an extension to the cooling-off period should be requested or, in some cases, the contract rescinded and the 0.25% forfeited. If this action is contemplated then informed instructions should be obtained from the client after explaining the consequences of the various actions.

If a survey is obtained that shows a non-compliance with a distance from the street or a side boundary then the contract should be made conditional upon the council issuing a building certificate. If the survey discloses that there is an encroachment over an easement or contrary to a restriction on use then either the contract should be subject to the easement being varied, the restriction being varied to allow the discrepancy, or the purchaser should understand the risks before proceeding.

In *Svanosio v McNamara* 96 CLR 186 the High Court dealt with an issue concerning the sale of a hotel that after completion was found to be partly constructed on the land sold and partly constructed on adjoining Crown land. The contract described the property sold as:

> All that piece of land being Crown allotment fifteen of section O ‘Grassy Flat’ Parish of Sandhurst County of Bendigo being the land comprised in

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conveyance No. 176 book 221 together with the licensed premises known as the ‘Bull’s Head Hotel’ erected thereon subject to all registered appurtenant registered easements (if any).

Between exchange of contracts and completion no survey was made of the land but shortly after completion the purchaser arranged for a survey to ensure that the licence could be renewed.

The discrepancy found on survey was substantial. In the joint written judgement of Dixon CJ and Fullagar J the discrepancy was described as:

> ... something like one third of the hotel building stands on Crown land. The bar, two bar parlours, two bedrooms, and the kitchen, are within the title. The whole of two bedrooms, part of another bedroom, and part of a “lounge” are outside it. The fact that it is on Crown land that the latter portion stands is a fact of practical importance.

The purchaser claimed that the contract should be held to be void as a result of a common mistake between the parties. Dixon and Fullagar said:

> So far as the contract is concerned, it may be assumed that all parties believed that the hotel stood wholly on the land sold. In that sense there was a “common mistake”. It may also be assumed that the appellant, if he had known that a considerable part of the building stood on Crown land, would not have entered into the contract. But these facts do not make the contract void.

> ... If the appellant had discovered before conveyance that a substantial portion of the hotel stood on land to which the respondents had no title, it seems clear that he could not have been compelled to complete the contract. A suit by the respondents for specific performance must have been dismissed: equity has refused to enforce a contract against an unwilling purchaser of land in cases where the defect of title was much less substantial than it is in the present case.

> ... To begin with, it is clear that the conveyance was not void, it is an instrument effective at law and in equity vesting in the appellant the legal and beneficial interest in the land conveyed.

> ... it is clear that equity will not undo a sale of land after conveyance unless there has been fraud or there is such a discrepancy between what has been sold and what has been conveyed that there is a total failure of consideration, or what amounts to a total failure of consideration.

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... It is the purchaser’s business to investigate the title thoroughly before he pays his money, and the conveyance effects a radical alteration in the position of the parties, new express or implied covenants generally taking the place of the obligations imposed by the contract.

... The defect of title, of which the appellant now complains, could have been the subject of a requisition by him. It is true that the making of a survey is the only thing which could in this case have revealed the true position, and the appellant could not have compelled the respondents to have a survey made. But he could himself, during the four months that elapsed between the making of the contract and completion, have ascertained the true position by having a survey made. The making of a survey is an ordinary precaution for a purchaser to take. Many purchasers, of course, decline to incur the expense involved in a survey, and in many cases it may appear unnecessary, but, generally speaking, and in the absence of misrepresentation, a purchaser may fairly be regarded as omitting the precaution at his own risk.

Svanosio highlights the importance of obtaining a survey, either before or after exchange. My view is that it is more important to obtain a survey before exchange.

**Illegal and non complying buildings**

Prior to the case of *Carpenter v McGrath* it was safe to exchange contracts and obtain a survey and a building certificate after exchange. This practice was based on the position that if a building did not comply with the provisions of the Local Government Act, or the council would not issue a building certificate, then this amounted to a defect in title sufficient to entitle a purchaser to rescind the contract. This has now changed and it is no longer safe to exchange and hope that a building certificate will issue unless the contract is conditional upon the issue of such a certificate.

The issue of a building certificate has the effect that a council cannot require demolition of an illegal improvement existing at the time the certificate issues, nor can it require alterations to a building arising from fair wear and tear for a period of 7 years after the certificate issues. This is now clearly set out in section 149E of the Environmental Planning and Assessment Act 1979.

It must be remembered that the sections have changed over the years and the cases are confusing as a result. Carpenter refers to section 317B of the Local Government Act and to the issue of a 317AE certificate. This was the previous certificate before the changes to make it a 149 certificate under the EPA Act.
In *Carpenter v McGrath* 40 NSWLR 39 the Court of Appeal was asked to consider whether the appellants’, Carpenter, were entitled to refuse to complete their purchase because of the illegality attaching to some of the buildings included in the sale. The contract for sale described the property as “house, stables, sheds and land”. The vendors, McGrath had obtained development consent for the erection of the shed in December 1983 but a condition was that no building work was to be carried out until a formal building application was lodged with council. No such application was lodged but the shed was built.

While the decision deals with a multitude of issues, we only need to examine the issue of whether the illegal building constituted a defect in title.

In his judgement Cole JA said:

> The Carpenters have appealed raising a number of points. First, they contended that as no building approval had been obtained for the erection of the shed, that constituted a defect in title depriving the vendors of any entitlement to serve a notice to complete.

> ... The appellants contended that failure to obtain building approval for erection of the shed constituted a defect in title. This was because there existed the potential for the local council to exercise its powers under 317B(1A) to order demolition in consequence of absence of building approval.

(Cole then dealt with a line of cases dealing with this issue and continued.)

> ... In 1985 in *McInnes v Edwards* [1986] VR 161 at 168 in the Supreme Court of Victoria, Kaye J expressed the view that alterations to a building without consent do constitute a latent defect in the vendor’s title. Having discussed the decisions in *Maxwell, Borthwick and Watkin*, his Honour considered the decision of the High Court in *Fletcher v Manton* (1940) 64 CLR 37 and *Summers v Cocks* (1927) 40 CLR 321. From these decisions his Honour concluded (at 168) that:

> “... the material time for the purpose of conveyance for determination whether a defect in title exists is at the time when the parties entered into their contractual relationship. The existence then of an order made or direction given in the exercise of a statutory power imposing a burden or charge on the land or the improvements thereon constitutes a latent defect in title. However, the mere possibility or

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probability or risk that the property will at a future date be subject to a statutory charge or burden does not constitute a latent defect in title.”

... In my respectful opinion the principles to be so derived are those enunciated by Kaye J in *McInnes* and lead to the view that “the mere existence of circumstance which create the possibility or probability or risk that the property will at a future date be subject to a statutory charge or burden does not constitute a defect in title”.

... it is the title which the vendor has contracted to convey which is established by the contract and thus it must be determined at the date of the contract. At that time a property may have the potentiality to be subjected to orders or charges pursuant to a number of local government, rating and other statutes, which potentiality may or may not in the future be realised. The passing of risk at the date of contract passes the risk of potentiality. This, as it seems to me, it is correct in concept to hold that mere potentiality of affectation does not constitute a defect in title.

The effect of *Carpenter v McGrath* is that is important to understand whether there are outstanding issues at the date of exchange.

Clause 11 of the 2005 Contract provides:

*Normally*, the vendor must by completion comply with a *work order* made on or before the contract date and if this contract is completed the purchaser must comply with any other *work order*.

Work order is defined in 1.

I have not dealt with *Tambel v Field* and do not expect you read or understand this case.