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Patent and Latent Defects

by Jeffrey Mikelberg

For anyone buying or selling a home, it is important to know about the obligations of a vendor. One issue that is particularly rich in case law is whether or not a vendor has a duty to disclose particular defects with property. The courts have established that the duty to disclose or not depends on how a defect is characterized: whether it is patent or latent.

Patent defects are those that are discoverable by inspection and ordinary vigilance on the part of a purchaser, such as visible cracks or water damage, whereas latent defects are those that would not be revealed by such inquiry, such as those which are structural in nature.

The general principle is caveat emptor, or “buyer beware.” This puts an important onus on the purchaser to arrange a home inspection and to ask plenty of questions about the property before entering into an agreement of purchase and sale. Outside of fraud or misrepresentation by the vendor, a purchaser will be required to complete a sale despite the presence of any patent defects. However, the principle of “buyer beware” is subject to an exception: a vendor is under a duty to disclose to the purchaser any known latent defects that will render the premises unfit for habitation or dangerous.

The distinction seems clear enough in theory, but the line can often be blurred in practice. On March 2, 2011, Madam Justice Hoy heard a motion to dismiss a lawsuit on the basis that the plaintiffs had no cause of action.

The plaintiffs had purchased a house from the defendant and brought a legal action when they discovered that a person convicted of child pornography lived across the street. The plaintiffs based their claim on the fact that this was a latent defect that the vendor had an obligation to disclose. The defendant argued that the conviction was public knowledge that could have been obtained by the plaintiffs through reasonable inquiry and, therefore, was not latent. Ultimately, the court dismissed the motion on the basis that it was not plain and obvious that the plaintiff’s action was certain to fail, suggesting that there is a possibility the plaintiffs will succeed at trial.

The case raises interesting questions about the scope of what constitutes a latent defect. Against the principle of “buyer beware,” should a seller be obligated to disclose everything he or she knows about neighbours that could be perceived as negative? Might disclosure lead to a libel or slander action against a seller who discloses to a buyer his or her understanding of a neighbour’s criminal convictions? Where does one draw the line, particularly in light of the objective of re-integrating criminals into law-abiding society?

A graduate of McGill University, Jeffrey, who is working at DSF as a summer student, is entering his last year of law school at the University of Western Ontario.



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Liability of Real Estate Agents on the Rise!

by Katerina Minaeva

A recent Court of Appeal decision suggests that real estate agents could be found personally liable for misrepresentations made by sellers. In *Krawchuk v. Scherbak*, a first time home buyer discovered a serious structural problem shortly after moving into her new home. She was forced to live elsewhere during repairs, which cost \$100,000.

The real estate agent assisted the sellers in the completion of a document called the Seller Property Information Sheet (“SPIS”), a standard form available from the Ontario Real Estate Association. The SPIS in this case did not reveal any information about plumbing or structural damage.

The real estate agent, acting for both the buyer and the seller, presented the SPIS to the buyer, who appears to have relied on it. At trial, the sellers were found liable for negligent misrepresentation. The Court of Appeal went one step further and found the real estate

agent also liable on the basis that the agent did not meet the obligation to the buyer to provide accurate information about the home. The court found that the real estate agent was aware of the foundation problems; that the buyer had asked specific reassurances about this; that the agent should have questioned the reliability of the information provided by the sellers; and that the agent should have made inquiries about the information provided by the sellers. These failures by the real estate agent amounted to “egregious lapses.”

This decision may raise the bar for real estate agents, requiring them to take further steps to verify the accuracy of the information provided to them by sellers.

Katerina is a DSF summer student in her third year at the University of Western Ontario Faculty of Law. She is fluent in English, Ukrainian and Russian.



Grandparent Rights

by Julie Tyas

Clients often ask about what rights their parents or grandparents have to see the clients’ children. The short answer is, generally, grandparents have few rights at all. They are considered “legal strangers” and are expected to establish and maintain a relationship with their grandchildren through their own child.

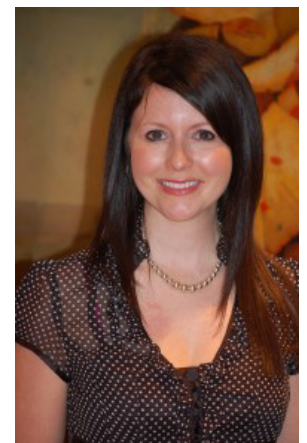
Therefore, if your son or daughter is going through a separation, you will usually only be able to see your grandchildren when they are residing with your child, subject to the following exceptions:

- (a) If the grandparents have helped to raise the child, they will likely be granted some access or visitation rights;
- (b) If the grandparent has an ongoing meaningful and positive relationship with a child, he or she may

be granted access as long as doing so does not threaten the child’s stability.

Even if a situation falls into one of the exceptions, the courts are still hesitant to deal with cases involving grandparents or other third parties on the basis that they do not have the necessary tools to make these arrangements work for all family members involved. Instead, the courts encourage grandparents and parents to try to come to an agreement through a family mediator or another qualified professional.

Julie is a lawyer with a practice that encompasses all aspects of family law. She was called to the bar in 2007 after studies at Wilfrid Laurier University and the University of Windsor. Her direct line is 416-446-5053.



Taking a DIP - Debtor in Possession Financing as a Creditor Remedy

by L. Viet Nguyen

The *Bankruptcy and Insolvency Act (BIA)*, and the *Companies' Creditors Arrangement Act, (CCAA)* allow for interim financing for corporate debtors. Creditors who depend on the survival of debtor companies—for example, where a debtor is a major supplier or customer—can use these statutes to keep the debtors in business and to protect their own interests.

Debtor-in-possession financing, or DIP financing, has long been used in *CCAA* restructurings to help corporate debtors reorganize. The DIP financier advances funds with court approval to finance operations as well as to pay professional fees of counsel and the chief restructuring officer while receiving a priority charge on the debtor's assets. The claims of DIP financiers can receive preferential or "excepted" status in the debtor's plan of compromise and arrangement, thereby potentially increasing recovery. This allows creditors to elevate the status of their claims while taking a greater role in ensuring the continued operation of the debtor company. The *BIA* was recently

amended to include similar provisions for corporate proposals. The court can order that all or part of the debtor's assets be subject to a charge in favour of a person who lends funds to the debtor during the proposal process. DIP financing is therefore an option even where the total debts of the company do not qualify it for a *CCAA* restructuring.

As with all insolvency and restructuring scenarios, each situation should be evaluated carefully to determine whether DIP financing is an option for a creditor to consider. Creditors and debtors should seek the advice of counsel early in the process before taking any particular step.

Viet specializes in commercial collection and mortgage recovery, as well as bankruptcy and insolvency. Called to the bar in 2002, Viet earned his law degree at the University of Western Ontario and is fluent in both of Canada's official languages. His direct line is 416-446-5801.



Employee Liability on Blogs and Facebook

by Suzanne Clark

Ever thought of writing exactly what you thought about your nagging boss on your Facebook page or blog? You may want to think twice before doing so.

There is an emerging consensus that off-duty conduct of employees that is detrimental to their employer can lead to discipline or dismissal. In *Alberta v. Alberta Union of Provincial Employees*, an employee was fired after her employer saw the contents of her personal blog, which contained unflattering comments about a number of her co-workers and management. Due in part to the employee's unapologetic attitude, an arbitration board ruled that the conduct was serious enough to undermine the employment relationship beyond repair, justifying discharge.

The more recent case of *Wasaya Airways LP v. Air Line Pilots Assn. International* also saw an employee fired for posting derogatory Facebook comments about the company's owners and customers.

The arbitrator in this case noted that although nothing in the Facebook post identified the company or stated that the grievor was an employee of it, the remarks had a real and material connection to the airline and gave reason to the company to have both substantial and warranted concerns about potential harm to their reputation. Ultimately, the arbitrator ruled that the racist nature of the employee's comments and the fact that they were "not the least bit complimentary towards the Company's clients" made them potentially damaging to the company's reputation. The employee was consequently dismissed.

So the next time you think of ranting on your blog about your boss, you may want to take a deep breath and change your plans.

Suzanne is DSF summer student and she is in her third year at University of Windsor, Faculty of Law. Suzanne was on Dean's Honor List from 2005-2008.



More join the team!

Devry Smith Frank LLP is pleased to welcome seven new members to its family.

Neesha John joins DSF as a legal assistant in the insurance defence group, bringing several years of experience working with litigation, insurance defence and personal injury files.

Julie Tyas was called to bar in 2007 after studying at Wilfrid Laurier University and the University of Windsor. As the newest member of the family law group, Julie is expert in handling issues related to both heterosexual and same-sex relationships.

Marian Gonsalves is a new law clerk/legal assistant for the ever-growing commercial litigation, banking recovery, and bankruptcy and insolvency group. Marian brings several years of experience working in the legal field.

Christopher Statham returns to DSF after his call to the bar in June. He is a graduate from the University of Toronto (B.A.H. & M.A. in Philosophy) and the University of New Brunswick's Faculty of Law. Christopher will be practicing in the commercial litigation and collections/recovery group.

Igor Poroger has started his articles with DSF. He is a graduate of the University of Waterloo and Queens University, where he earned an LL.B.

Leonard Bernstein has also begun his articles at DSF. He is a graduate of the University of Western Ontario and the University of Calgary.

Vijay Sharma joins the accounting department, bringing several years of experience in accounting and sales at important and well-respected institutions in Toronto.



We are growing! Our building is expanding to give us an additional 15,000 sq ft from which to continue to meet the needs of our ever - increasing number of clients. Construction is scheduled to be completed in the summer of 2012.



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From its genesis in 1964, Devry Smith Frank *LLP* has grown to a professional corps of 43 lawyers, 5 licensed paralegals, 28 law clerks and a complement of highly skilled and dedicated staff, offering a broad range of legal services to our individual, business and institutional clients.

To learn more, please visit our website at www.devrylaw.ca, our Facebook page, follow us on Twitter or call us at 416-449-1400.

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