Land Titles Act

R.S.O. 1990, c. L.5, as amended.

IN THE MATTER OF Application for Compensation to the Land Titles Assurance Fund No. 304-05-52 made by Carl Page and Barbara Page and received by the Director of Titles on July 29, 1994;

AND IN THE MATTER OF Application for Compensation to the Land Titles Assurance Fund No. 304-05-53 made by Carl Page and Barbara Page and received by the Director of Titles on July 29, 1994.

REASONS FOR DECISION

THESE MATTERS CAME BEFORE ME for hearing at North Bay, Ontario on October 29, 1997 at which time the following people appeared:

Izaak de Rijcke	counsel for the applicants
Carl Page	applicant
Barbara Page	applicant

BACKGROUND

These applications, although made in 1994, were not ready to proceed to hearing until 1997. In 1978 the applicant, Carl Page, acquired his lands (known as part of Lot 2 in Concession C, Township of Springer, District of Nipissing and described in Parcel 12823 in the Register for Nipissing) by Instrument No. 194736 registered in the Land Titles Office for the Land Titles Division of Nipissing (No. 36) at North Bay. After that he acquired an additional 25 feet of land, described as Part 1 on Reference Plan 36R-5616, which was consolidated into parcel 12823. The consolidated parcel is referred to herein as the "Lands". The Lands are municipally known as 216 Promenade du Lac and they are located on the south side of Promenade du Lac in Sturgeon Falls, Ontario and on the north side of Lake Nipissing. The title to the Lands was transferred by Carl Page to himself and his wife Barbara Page, as joint tenants in 1981.

Mr. Page constructed an addition to his building in 1980 and another in 1983. He dug a well some time thereafter. Unknown to Mr. Page at the time any of this work was undertaken, the additions and the well were constructed on land owned by his neighbour to the east, Mr. Noel. In 1987, Mr. Noel commissioned a survey of his property and it was discovered that part of the Pages' house and the Pages' well were located on Mr. Noel's land. In March of 1988 Mr. Noel commenced a civil action

where he asked for a declaration of ownership to the land on which part of the Pages' building and well were located, asked for removal of the part of the building that encroached onto his property and removal of the well, and asked for damages for trespass and costs. In 1990/1991 Mr. Noel commenced an application under the Boundaries Act and commissioned a survey by Mr. Peter Bull O.L.S. That application included a request for a determination of the location of Mr. Noel's westerly boundary of his property, which was also the easterly boundary of the Pages' property. The location on the ground of that boundary would then determine ownership of the land in issue. The civil action had been held in abeyance pending the outcome of the Boundaries Act application. The decision in the Boundaries Act application was given in June of 1994 and the applicants filed an appeal from that decision in July of 1994. In July of 1994 the applicants filed these two applications for compensation with the Director of Titles. The appeal of the Boundaries Act decision was abandoned in April of 1995 and the court gave its reasons in the civil action in August of 1995 (Tab 10 of Exhibit 3) with supplementary reasons in March of 1996 (Tab 11 of Exhibit 3). The decision of the court was reported at (1995) 47 R.P.R. (2d) 116. The applicants issued a Notice of Proceedings against the Crown in November of 1995, and I am advised that those proceedings against the Crown have not been continued.

At the conclusion of the civil action between the Pages and Mr. Noel the court acknowledged that the decision in the Boundaries Act application established the location of the westerly boundary of the Noel property (as indicated by the survey prepared by Peter Bull O.L.S. for the Boundaries Act application). The court concluded that part of the Pages' building and their well were indeed located on Mr. Noel's land. However, the court also concluded that Mr. Page undertook the additions to his building and the construction of the well in the mistaken, but honest (bona fide) belief that he owned the property on which he built those improvements. Under the provisions of the Conveyancing and Law of Property Act, the Pages were entitled to purchase the land upon which those improvements were built from Mr. Noel at fair market value. Mr. Page and his wife Barbara Page acquired the title to the lands in question in July 26, 1996 by a transfer registered as Instrument No. 28608 in the land titles office at North Bay (partial copy at Tab 2 of Exhibit 3). The lands acquired from Oscar Noel in transfer No. 28608 were described as part 1 on Reference Plan 36R-10100, a copy of which plan was included at Tab 3 of Exhibit 3. Reference Plan 36R-10100 was prepared by Peter Bull O.L.S. on October 23, 1995 and part 1 shown thereon is a piece of land located at the westerly boundary of Mr. Noel's property, but including just enough land to accommodate the well and the Pages' building plus 6 feet of land to allow for compliance with the side yard requirements of the applicable zoning by-law. Part 1 on Reference Plan 36R-10100 is not rectangular in shape--it is shaped like a half moon and has an area of 3,281 square feet.

The first application made by the applicants to the Land Titles Assurance Fund arises out of the fact situation described above and the amount claimed is for the cost of acquiring the land from Mr. Noel, plus interest, together with the applicant's legal and survey costs, for a total of approximately $234,000.00, as set out at Tab 16 of Exhibit 3. Mr. Page mentioned in his testimony that he had incurred a further $9,000 in out of pocket expenses. ("Application # 1")

When Mr. Page purchased his land in 1978 he thought that he was acquiring a particular piece of land approximately 99 feet wide along the south side of Promenade du Lac. He purchased from Mrs. Smith. Included in the purchase was a bill of sale for a boat house located to the west of where Mr. Page thought the westerly boundary of the land he was purchasing was located. He acquired the structure on closing from Mrs. Smith under a bill of sale and after closing he proceeded to purchase that land, being a further 25 feet of frontage to the west of what he thought he already owned, from Mr. Bruno Vannier for $10,000. A survey was prepared by J.J. Newlands O.L.S. which was deposited in the land titles office at North Bay as Reference Plan 36R-5616. Part 1 on that plan was conveyed to Carl Page by Transfer, a copy of which was found at Tab 20 of Exhibit 3. Reference Plan 36R-5616 was found at Tab 21 of Exhibit 3. These lands were subsequently consolidated into parcel 12823.

Although the westerly boundary of the applicants' property was never confirmed under the Boundaries Act, the applicants have concluded that since their easterly boundary was effectively confirmed under the Boundaries Act, they already owned the land which Mr. Page purchased from Bruno Vannier, shortly after his purchase in 1978. It is this purchase from Mr. Vannier which gives rise to the second application for compensation to the Land Titles Assurance Fund. The Applicants claim the sum of $62,193.80 as compensation, based on the original purchase price of $10,000 plus interest, as set out in Tab 23 of Exhibit 3. ("Application #2")

I propose to deal with the legal requirements for these claims to be successful and the legal arguments put forward to establish that these legal requirements have been met.

ISSUES

In order for these applications to be successful, the provisions of the Land Titles Act in sections 57 to 59, as applicable, must be complied with. The entitlement provisions that are relevant are as follows:

57(1) A person wrongfully deprived of land or some estate or interest therein, by reason of the land being brought under this Act, or by reason of some other person being registered as owner through fraud or by reason of any misdescription, omission or other error in a certificate of ownership or charge, or in an entry on the register, is entitled to recover what is just, by way of compensation or damages, from the person on whose application the erroneous registration was made or who acquired the title through the fraud or error.

57(4) If the person so wrongfully deprived is unable by such means or otherwise to recover just compensation for the person's loss, the person is entitled to have the compensation paid out of the Assurance Fund, so far as it is sufficient for that purpose having reference to other charges thereon, if the application is made within six years from the time of having been so deprived or, in the case of a person under the disability of minority, mental incompetency or unsoundness of mind, within six years from the date at which the disability ceased.

Other provisions that are relevant in this case are:

59(1) No person is entitled to recover out of the Assurance Fund any compensation,
.....

(c) where the claimant has caused or substantially contributed to the loss by the claimant's act, neglect or default...

The issues to be determined are:

1. Were the applicants deprived of an interest in land by reason of any misdescription, omission or other error in a certificate of ownership or in an entry on the register?

2. Were the applications made within 6 years of being so deprived of an interest in land?

3. Did the applicants cause or substantially contribute to the loss by their act, neglect or default? AND

4. If the applicants are successful in proving their claims, what is the quantum of the compensation that should be awarded to them?

FACTS and FINDINGS

The facts surrounding the purchase of the Pages' property at 216 Promenade du Lac in Sturgeon Falls and of the construction, and renovation of the Pages' home and digging of the well are set out in the decision of Valin J. (Tabs 10 and 11 of Exhibit 3) and in the decision of Mr. Meisner in the Boundaries Act application (Exhibit 4). I have read that material and considered the findings in both decisions, and rather than summarize those findings here, I will incorporate them by reference as I proceed with these reasons.

Mr. Page testified at every proceeding involving the Lands including the hearing before me, and I found him to be a credible, consistent witness. He described the circumstances surrounding the purchase of the property in 1978. He knew he was buying 99 feet of land and he walked the property and was satisfied that the house and garage was on the 99 feet the agent said was for sale. He made the assumption that the land was bounded on the east by a row of trees. He made that assumption because the grass was cut and the land was maintained to the east of that tree line and it was not to the west of that line. The tree line was the same as that shown on the Bull survey (Exhibit 5). In addition he found a pin in the ground at the road in line with the row of trees. He paced off 99 feet along Promenade du Lac going westerly from the survey pin near the row of trees and realized that a boat house which the vendor said she owned was not included within the 99 feet of land.

The vendor insisted she owned the boat house, but because of the dispute the vendor was having with her neighbour to the west, only a bill of sale was given for the boat house. (See the Boundaries Act decision at page 40.)

Mr Page decided to purchase the property without aid of a survey. The lawyer he used to complete the transaction advised him to obtain a survey, but he did not do

so. (Again the facts are clearly set out in the decision of Valin J. at page 121 and 122 and in Mr. Meisner's decision at pages 39 and 40).

Unfortunately, the survey work that had been completed in this area was based on a plan prepared by Mr. Lackstrom O.L.S. in 1960, which due to error, located the limit between Lots 1 and 2 in Concession C in the wrong location. Valin J. at page 119 of his decision where he was discussing the Lackstrom survey indicated that: "in fact, at the lakeshore, he had misplaced that line 25 feet to the east". Since all of the properties in this area were based on metes and bounds descriptions which used that line between Lots 1 and 2, the location on the ground of the land described in the conveyances of those properties was in error. In effect, each of the properties was actually situated a further 25 or so feet westerly of where prior surveys had located them. Mr. Blackburn's survey in 1977 was the first to note the error in the location of the limit between Lots 1 and 2. Mr. Page had owned land in Lot 1 Concession C and was aware of the problems with those lands in Lot 1 due to the survey inaccuracy, prior to his purchase in Lot 2 in 1978. He was not aware of the 1977 Blackburn survey, although there was some evidence that the plan had been sent to his solicitor. Valin J. (at page 129 of his decision at Tab 10 of Exhibit 3) did not find that Mr. Page's solicitor who acted on the purchase in 1978 knew of the 1977 Blackburn survey. When Mr. Peter Bull O.L.S. prepared the survey for the Boundaries Act application he not only used the "correct" location for the limit between Lots 1 and 2, which he said was actually 27 feet westerly of that position as previously determined by Mr. Lackstrom at the southerly limit of Promenade du Lac (see page 17 of the Boundaries Act reasons, Exhibit 4), but he also re-established the direction of Promenade du Lac by using the angular relationship of 77 degrees 07 minutes between the accepted position of the line between Lots 1 and 2 and Promenade du Lac, rather than by using the astronomic course as Mr. Blackburn had in his 1977 survey. Mr. Bull's re-establishmentof Promenade du Lac resulted in an angular rotation of 3 degrees 34 minutes and 30 seconds when applied to the directions of the sidelines between the various parcels along Promenade du Lac and it had the effect of including all of the travelled portion of Promenade du Lac (now an asphalt strip) within the re-established limits for the road, (See pages 16 and 19 of the Boundaries Act reasons.) Peter Bull's survey was accepted for purposes of the Boundaries Act application and hence the line he drew representing the westerly limit of Mr. Noel's property confirmed the location of that limit which was also the easterly limit of the Pages' property.

However one describes what happened, the effect on Mr. & Mrs. Page was that the additions they built to their home and the well they dug were on land that was owned by Mr. Noel and not by them. This is one case where having a title governed by the land titles system which does not permit adverse possession claims to accrue, can be seen as a serious disadvantage.

Mr. Page purchased 99 feet of property from Mrs. Smith for $38,000. He then spent an additional $10,000 to acquire a further 25 feet of property. Tabs 19 and 20 of Exhibit 3 contain copies of the agreement of purchase and sale and the transfer for the additional 25 feet of land. The agreement of purchase and sale at Tab 19 refers to the land as the easterly 25 feet of parcel 12846, as shown in red on the sketch attached. There was no sketch attached in Tab 19. The transfer at Tab 20 of Exhibit 3 conveyed part of parcel 12847, being part 1 on reference plan 36R-5616. Mr.

Page said he was buying 25 feet because it contained the boat house that he was interested in having. I note that not one of the agreement of purchase and sale, the reference plan and the transfer mentions or shows the boat house and that the reference plan shows part 1 as in parcel 12847 and adjacent to parcel 12823. The boat house is adjacent to the 99 feet that he thought he owned and it is shown on Exhibit 5, Mr. Bull's survey. Mr. Vannier asked for $10,000 for the property which Mr. Page thought was reasonable. Mr. Page said there was no point in negotiating with Mr. Vannier over the price. He also said that others thought he was crazy paying that much money but he concluded that he could not construct the boat house for that amount of money.

Tab 4 of Exhibit 3 contained the certificate of ownership issued when Mr. Page purchased in 1978. The certificate has been updated to show the consolidation of the part 1 purchased from Vannier on Sept. 1, 1980 and the transfer in 1981 to Mr. Page and his wife. At the time of the 1980 purchase from Vannier, Mr. Proux picked Newlands as the surveyor and Mr. Page paid the surveyor. Tab 22 of Exhibit 3 contains information concerning Mr Newlands. Tab 22 contains the reported decision that removed Mr. Newlands from the rolls as a surveyor in August of 1980, within weeks after doing the reference plan 36R-5616 for Mr. Page.

Mr. Page had the well drilled in 1987 and it was 12 feet from the tree line. Mr. Page agreed with his counsel that this event started the "slide in relations" with Mr. Noel. Mr Noel started the civil litigation and he also made the Boundaries Act application. After the decision in the Boundaries Act application, the civil action proceeded and Tab 10 of Exhibit 3 contains the decision of Valin J. Mr. Page testified about the final resolution of the matters between Mr. Noel and himself including the payment of funds and the registration of the transfer to the applicants of the lands on which the Pages' house and well had been constructed.

The applicants are making these claims because there has been a problem for a long time and based on Mr. Page's knowledge at time of purchase, he thought the part he subsequently "purchased" from Noel was already owned by him. In 1996 he paid $123,000 for a piece of property he already thought he owned.

Mr. Page was asked about surveyors who have performed work in the area. He said that at least 10 of 12 of them have gone through the area and did not find the survey marker that Mr. Bull found at the northwest corner of Mr. Noel's property as shown on Exhibit 5. This survey monument was attributed to Mr. Low O.L.S. and was an essential piece of evidence for Mr. Bull to reach his conclusions. Mr. Page stated that no one would have found what Mr. Bull found in 1991 if he had hired a surveyor in 1978 when he purchased or if he had hired a surveyor other than Newlands when he purchased the additional 25 feet on the westerly side of his property in 1980. He based that conclusion on conversations with both Mr. Simpson whom he hired for the Boundaries Act application, and conversations with Mr Bull.

Mr. Page was asked if he had sought compensation from anyone. He indicated that surveyor Newlands had lost his licence and he thought he had gone bankrupt and his whereabouts was unknown. Mr. de Rijcke confirmed that Mr. Newlands was not insured and that mandatory errors and omissions insurance for surveyors did not exist in the summer of 1980. Mr. de Rijcke also spoke of contacting Mr. Simpson's

insurers and he was told that Mr. Simpson had adhered to a standard of care observed by various surveyors who practised in the local area and since he had met that standard, any claim was or would be refused (Mr. Simpson was the surveyor Mr. Page used for the Boundaries Act application.) Finally, Mr. Page indicated that he had not approached Mr. Vannier and asked for the $10,000 back as he probably would not have been met with a polite response.

ARGUMENT

Counsel for the applicants argued strenuously that this is a case where compensation should be paid to his clients out of the Land Titles Assurance Fund. He argued that the general boundary rule does not require precise relationship between the physical features that define the parcel and the exact boundary to be determined. It operated in an environment in England where there were physical demarcations of the extent of a parcel on the ground which were sufficient to keep intruders out and livestock in. Exhibit 3 included an excerpt from an English publication at Tab 8 where the author described the general boundary concept and pointed out that the removal of hedgerows and open plan development in England would have an effect on the usefulness of the general boundary rule. Counsel pointed out that the provisions in the current section 140 of the Land Titles Act have their origin in the 1885 Land Titles Act which had as its model the English Act (which in turn adopted the general boundary rule). Counsel made it clear that the 1885 Ontario Act never adopted guaranteed boundaries as some Torrens systems may have. Counsel then proceeded to argue that with the adoption of the English statute as a model for the 1885 Land Titles Act in Ontario, subsection 140(2) should be interpreted to require that there be a parcel of land on the ground to which the title holder has the useful enjoyment. In other words counsel argued that the subsection should be read to allow the implementation of the general boundary rule whereby the useful existence on the ground of a parcel, the title to which is recorded in the system, is guaranteed. While the precise boundaries are not guaranteed, the useful existence of the parcel on the ground is theoretically guaranteed.

Subsection 140(2) of the Land Titles Act reads as follows:

> (2) The description of registered land is not conclusive as to the boundaries or the extent of the land.

My understanding has always been that the Land Titles Act does not guarantee that the property where title is "guaranteed" is located in any particular location or is of a guaranteed extent. The task of establishing on the ground the location of a particular parcel of land (the title to which is recorded in the land titles system) and its extent is that of the surveyor. The plain reading of subsection 140(2) of the Land Titles Act lends itself to that conclusion. The plans and descriptions recorded in the land titles system do not include references to buildings or other topographical features, so it is not possible, without a survey, to be satisfied that the building or improvement a person is buying is located on the land which is included in a land titles parcel or certificate of title.

Even if I assume that the general boundary rule was not ousted by subsection 140(2), the useful existence argument does not provide a remedy in Application # 1. Counsel argued that the parcel of land Mr. Page purchased from Mrs. Smith was a piece of land that did not usefully include the separate part which Mr. Page subsequently had to buy from Mr. Noel. Useful existence has to be determined in the context of what is guaranteed and I do not see that the certificate of title or the parcel register guaranteed that Mr. Page was the owner of the land between the row of trees and the westerly boundary of Mr. Noel's land, as confirmed under the Boundaries Act. Mr. Page did acquire a piece of land which had a very useful existence at the time of his purchase and does so now. The reason it was not useful for Mr. Page's purposes is that it was not located where he assumed it to be. That assumption had disastrous consequences for Mr. Page because he acted on that assumption and built his additions and dug his well. I note that there was no evidence that any part of the building which existed when Mr. Page purchased from Mrs. Smith was situated on Mr. Noel's land.

The useful existence argument does not assist with Application # 2. Counsel argued that the applicants already had ownership of a 25 foot parcel for which they paid Mr. Vannier another $10,000. Neither the civil action nor the Boundaries Act application dealt directly with the westerly limit of Mr. Page's property which he purchased from Smith. Application #2 is made on the basis that if the boundary between Page and Noel is not the tree line, but is really approximately 25 feet west of that tree line, then one must assume that the westerly boundary of the Page lands purchased from Smith is 25 feet (approximately) further west than what was originally thought by Mr. Page to be the case. That being so, Mr. Page would have already owned the land on which the boat house was situated and would not have had to buy one half of the adjacent parcel from Mr. Vannier. But the real question is: what did he actually buy from Mr. Vannier. Mr. Page, through his lawyer, had a survey prepared for the 25 feet (reference plan 36R-5616) and the transfer was registered using that reference plan for description purposes. The reference plan showed that the land was in parcel 12847, and was westerly of, but adjacent to parcel 12823. I am not prepared to assume that part 1 on reference plan 36R-5616 describes the land on which the boat house is situated and I am not prepared to assume that the applicants paid twice for the same land.

If there were a determination that the applicants did pay twice for the same land, then they received nothing for the second transfer. I recognize that Mr. Newlands is not around to pursue, but Mr. Vannier is and Mr. Page did not even consider asking him to refund the purchase price for the land Mr. Vannier said he owned. I fail to understand how Mr. Page could expect to receive compensation from the Assurance Fund without first proving that he did not get the additional 25 feet and then pursuing the person who purported to transfer it to him, as contemplated by subsection 57(1) of the Land Titles Act. Entitlement to compensation arises under subsection 57(4) only when the applicant is unable to recover from the person on whose application the erroneous registration was made. I note also, that Mr. Page did not rely on the land titles records in connection with this transaction and was not entitled to assume that the land titles system was guaranteeing that the boat house was located on the land purchased from Mr. Vannier.

A formal analysis of the entitlement provisions is required.

1. *Were the applicants deprived of an interest in land by reason of a misdescription, omission or other error in a certificate of ownership or in an entry on the register?*

Dealing first with Application #1, there is no doubt that the applicants did not acquire the title to the land between the line of trees and the westerly limit of Mr. Noel's property as confirmed under the Boundaries Act. Even after the civil action, where they were permitted to "buy" part 1 on 36R-10100 from Mr. Noel, they did not acquire title to all of that land up to the tree line. But the question remains: was it a misdescription or error or omission in the certificate of title (or in the parcel register) that caused this deprivation? I did not receive a copy of the parcel register, but I assume that the description of the land in that parcel register is the same as in the certificate of title and I therefore only refer to the certificate of title hereafter.

The possibility of a misdescription was not argued at the hearing in front of me. It is a factor which could lead to liability. However, I have examined the survey and title histories in the decision under the Boundaries Act (Exhibit 4) and I have examined some of the exhibits that were used at the Boundaries Act hearing and I have concluded there is no misdescription. Mr. Meisner, at page 4 of his reasons in the Boundaries Act application concluded that the descriptions for the parcels subdivided by Mabel Low in the 1920s along the southerly side of Promenade du Lac in Lot 2 were unambiguous and they fit together with no overlaps or gaps. These parcels represented the prior titles for the Page and Noel lands. Hence there can be no misdescription.

The next consideration is whether there was an error or omission in the certificate of title that caused the deprivation. For the reasons set out above I do not find that there was any error or omission in the certificate of title, taking into consideration the guarantee of title and the limitations in subsection 140(2) as referred to above. I find that the loss was caused by the assumptions made and risk assumed by Mr. Page and not by an error in the certificate of title.

Before leaving the liability issue I considered the argument put forward by counsel that this problem was well know to officials in the 1970s and the land registrar should have warned the local surveyors and lawyers. The evidence on this point consisted of two letters exchanged between lawyers and municipal officials and there is a mention in those letters of the Master of Titles and 52 affected properties in Lots 1 and 2 Concession C, Springer Township. Even assuming there was some knowledge on the part of the Master of Titles of the problem, there is no duty to warn users of the system, especially lawyers and surveyors who are professional people whose opinions and expertise are intended to identify and solve these kinds of problems. To find such a duty, especially in a situation which is not guaranteed under the land titles system would impose an onerous and unrealistic duty on the land registrar and relieve the professionals of their responsibility.

2. *Were the applications made within 6 years of being so deprived of an interest in land?*

For purposes of these applications, one could take the date the decision under the Boundaries Act was issued (June 3rd, 1994) and treat that as the time when it was finally confirmed that the applicants did not own the piece of land on which part of their house and well had been built. At that time, the title to the additional 25 feet was in question. The applications were made within 6 years from that date. However, given my decision on the first issue, it is not necessary for me to make this determination.

3. *Did the applicants cause or substantially contribute to their loss by their act, neglect or default?*

Assuming that there had been some reliance on the certificate of title and some liability to the applicants, which I have been unable to find, I would also have to deal with the concern in Application # 1 that by not arranging for a survey of the property at the time of its purchase in 1978, the applicants have caused or substantially contributed to their loss and thereby prevented their claim from being successful. Valin J. at page 129 of his decision found that Mr. Page had been reckless in not obtaining a survey when he purchased in 1978. I need not look further as the evidence is clear that the survey was not obtained. Mr. Meisner also discussed the matter at page 40 of his decision.

Mr. Page indicated to me that it would not have been of any use to get a survey because he had determined (subsequent to his purchase) that ten or twelve surveyors have passed through the area and none of them found the monument which was at the northwest corner of Mr. Noel's property and was key to Bull's survey (Exhibit 5). However, I disagree with him for a number of reasons. First, Mr. Bull rendered a full opinion which he arrived at after considering all of the evidence. The survey monument which he located at the northwest corner of Mr. Noel's property was a very important piece of information but it was not the only piece of evidence he relied upon. The summary of his evidence given in chief and on cross examination at the Boundaries Act hearing (found at pages 14 to 25 of Mr. Meisner's decision) gives a good indication of how Mr. Bull arrived at that opinion. Secondly, by 1977 when Mr. Blackburn performed the first survey on the land purchased by Mr. Page, he knew at least that the limit between Lots 1 and 2 Concession C as established by Mr. Lackstrom was in error and he correctly located that limit. Therefore the property he surveyed was approximately 25 feet further to the west than Mr. Lackstrom would have shown. Even if the angular rotation had not been discovered at that time, the fact that the property was 25 feet further west of where Mr. Clarke's survey had placed it was know by surveyor Blackburn and would have been detected by a competent surveyor at that time. (Clarke O.L.S. was a partner of Mr. Lackstrom and he had prepared a survey of the Noel property which indicated that the westerly boundary of Noel lands was at or near the tree line; the row of trees was planted by Mrs. Noel after the Clarke survey was completed.) That in itself would have prevented the loss as Mr. Page would have known that he did not own to the tree line prior to the construction of the two additions and the addition of the well. Presumably he also would have had the option of not completing the purchase if what he thought he was buying was different from what he actually was getting,

as evidenced by such a survey.

Valin J. found that Mr. Page honestly believed that he owned the land on which he constructed his additions and his well. That was sufficient for purposes of the Conveyancing and Law of Property Act to give Mr. Page the remedy he sought of being able to purchase the land he mistakenly believed he owned. I have no doubt that Mr. Page believed he owned that land, but I have to be concerned about how he arrived at that conclusion. He did so by assuming that what the real estate agent told him was the boundary to the east was correct, and pacing off 99 feet to a point. Certain features on the ground led him to believe that the location of the boundaries as he determined them was correct and he decided to live with those assumptions and not get a survey. He had owned property in Lot 1 Concession C and knew of the survey problems in that area--only 10 or so properties to the east of the Lands. He also knew that there was some uncertainty about the lands to the west of what he purchased from Mrs. Smith. Yet he said he had no reason to believe that there was any problem with the easterly limit of the property he was buying.

Mr. Page testified that he assumed the legal risk of not getting a survey (See Boundaries Act decision at page 40.). Valin J. specifically mentioned that Mr. Page's neighbours did not get a survey either when they purchased their properties. However, none of those neighbours has applied for compensation and furthermore Mr. Noel conveyed a piece of his property to his neighbour to the east in 1963 when it was believed that the neighbour had built onto Mr. Noel's property. Another neighbour further to the east had done the same thing in 1962. Those neighbours knew about the problem and they solved the problem among themselves as best they could at that time. Unfortunately the applicants were unable to use the same type of solution for the problem until the court required Mr. Noel to convey part 1 on plan 36R-10100 to them.

If I had determined that the Assurance Fund was liable for compensation in Application # 1, I would have denied compensation pursuant to clause 59(1)(c) of the Land Titles Act on the basis that Mr. Page caused or substantially contributed to his loss by not obtaining a survey at the time he purchased in 1978.

4. *If the applicants are successful in proving their claims, what is the quantum of the compensation that should be awarded to them?*

At the hearing I left open the possibility of asking any questions or asking for clarification of the quantum of the claims. I have not asked for additional information as I have decided there is no liability on the part of the Land Titles Assurance Fund in these two applications.

Had I decided the liability issue in Application # 1 in favour of the applicants, I probably would have awarded the value of the entire piece of land that the applicants thought they owned, but which turned out to be owned by Mr. Noel and I would have based that value on the square footage. I would not have allowed any interest component to be compounded annually; rather I would have used an interest rate and calculated simple interest only.

Had I decided the liability issue in Application #2 in favour of the applicants, I would

have considered what the appropriate value of the 25 feet of land was and there would have been an interest component to the award, calculated as simple interest only. In determining the value, I would have treated the land as vacant land, since Mr. Page already owned the boat house under a bill of sale from Mrs. Smith, and I would have valued the land at substantially less than $10,000.

The reasonableness of the conduct of the applicants in the civil action and the quantum of the costs which were paid to Mr. Noel would have required further argument.

These are the reasons for issuing a Notice of Determination dated this same date wherein I determined that the Land Titles Assurance Fund is not liable for payment of compensation to the applicants in either of Application #1 or Application #2.

Dated at Toronto, Ontario, this 29th day of December, 1998.

Barbara E. LeVasseur
Sr. Deputy Director of Titles

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