THE LAWRENCES® LETTER

News and information for clients and friends of Lawrence, Lawrence, Stevenson LLP

SPRING 2012

For Lack of Evidence

Anthony E. Bak

In the course of business, disputes arise. If those disputes should end up in court, the case will be decided on the strength of the evidence presented. Sadly, many businesses do not record the early stages of a dispute, so there is little to prove who did what, when, and to whom.

Take the case of ABC Manufacturing ("ABC"), which bought a machine from XYZ Machines ("XYZ"). Shortly after installation, the machine began to malfunction, disrupting production. Over time, the machine broke down more frequently, shutting down ABC's production line completely for prolonged periods. Despite frequent discussions between representatives of ABC and XYZ and numerous attempts to resolve the technical problems, little or only temporary improvement resulted. Eventually XYZ said they could do nothing further. ABC felt that it had no alternative but to commence legal proceedings.

By the time the matter came to trial, ABC's chief engineer (the person primarily handling the technical problems with the assistance of XYZ's representatives) had moved to another jurisdiction and was unavailable to testify. ABC's president knew about the problems in general terms, but was not part of the meetings or discussions with XYZ's representatives. When the matter came to court, he did the best he could but was unable to provide a precise chronology or a complete list of specific problems, the corresponding dates, and the failed attempts at rectification. When cross-examined at trial, his testimony was inconsistent and sometimes contradictory.

The court concluded that the problems with the machine appeared relatively minor and not significant enough to merit the damages claimed.

How could ABC Manufacturing have achieved a better result? By keeping proper records. The company should have kept a production log showing the output generated by the machine. Entries should have been made in that log showing when the machine was inoperative due to mechanical failure. All telephone complaints made to the manufacturer should have been documented with at least a memorandum to file, or a letter or email to the manufacturer confirming the problems.

All emails and responses should have been detailed, complete and specific. They should also have been

secured and kept for trial purposes to confirm the actual chain of events that transpired. Any meetings or attempts by the manufacturer to repair the machine should have been documented with minutes, including the nature of the problem, the reason for the malfunction and the corrective steps the manufacturer was taking to remedy the problem. Any service calls and documentation confirming parts replacement or repair should have been kept. With such a paper trail, the trial could have proceeded even without the availability of ABC's president and could have been used as a basis for cross-examining XYZ 's witnesses at trial.

Litigation can be won or lost well before commencement of legal proceedings. It is often not the strength or weakness of the case, but rather the existence or lack of corroborative evidence that will help the court to find in your favour. The time to assemble the evidentiary trail starts with the realization of the problem, not months or even years later, when litigation appears to be the only remedy left.

Lawrences' Litigation Group has extensive experience in helping businesses prepare for litigation, both as plaintiff and defendant. We can also help you anticipate the problems that can lead to litigation and prevent them wherever possible.

Tony Bak is a partner in Lawrences' Litigation Group. He practises civil litigation, with extensive experience in the automotive industry. He can be reached at (905) 452-6875 or aebak@lawrences.com.

In this issue:

Selling Land:

Verbal Agreements can be Enforced

Maja Mitrovic

Tom and Sally own neighbouring cottage properties on a lake shore. Tom sells his cottage property conditional upon the installation of a new septic system. However, he can't install a new septic system without purchasing a portion of abutting lands from Sally. Tom and Sally exchange emails and have an oral discussion about the sale of a portion of Sally's land at a purchase price to be paid at a later date. They sign an easement agreement so that Tom can have immediate access to the land, and a deed transferring a portion of Sally's land to Tom so that Tom can apply for a permit to install a septic system. Subsequently, Tom incurs financial hardship and pays Sally only a portion of the agreed-upon purchase price. Can Sally enforce their agreement?

Although contracts reached orally or by email can be valid and binding, in order to have clear and undisputed terms that set out both of the parties' rights and obligations, it is vastly preferable to have a written, signed agreement of purchase and sale.

Is There an Agreement?

The courts have concluded that an exchange of emails may constitute an agreement in writing for the sale of land, if the agreement contains all of the essential terms of a contract for the sale of land, such as the parties involved, the price, and the property in question. The existence of an agreement does not depend on a formal written document; a valid and binding agreement exists if the parties have agreed on all of the essential provisions of an agreement orally and they intend the agreement to be binding. Further, such agreements can be for the purchase and sale of the entire land or a part of the land.

Is the Agreement Enforceable?

Section 4 of the *Statute of Frauds* states that to be enforceable, agreements regarding land must be in writing and signed by the transferring party. In this case, the agreement was in writing, but there were no signatures; thus, the agreement was not enforceable under the Statute of Frauds.

In What Other Ways Could the Agreement be Enforceable?

In some cases, contracts that are otherwise unenforceable can become enforceable through what is called "part performance", where a party carries out his or her contractual obligations, the other party knows that those obligations have been carried out, and those obligations are to the detriment of the first party. The delivery of an offer to purchase land and a deposit would not normally amount to an act of part performance, but in this case, Sally executed an easement agreement and deed. The courts determine what constitutes part performance on a case-by-case basis, but Sally would be able to claim that an enforceable agreement for the purchase of the land exists, according to the doctrine of part performance.

The Value of Written, Signed Agreements

Although contracts reached orally or by email can be valid and binding, in order to have clear and undisputed terms that set out both of the parties' rights and obligations, it is vastly preferable to have a written, signed agreement of purchase and sale. Also, never sign and deliver a document transferring title to your property to someone else before you have received the full purchase price. Lawrences' Real Estate Group has extensive experience in drafting agreements for the purchase and sale of land and can help you determine exactly how your agreement should be structured.

Maja Mitrovic is an associate with Lawrences' Real Estate and Business Law groups. She can be reached at (905) 452-6892 or mmitrovic@lawrences.com.

ESTATE PLANNING PART I

The Difference Between a Will and an Estate Plan

Michael J. Prsa

Murray and Sara own a house, which is registered in both their names as joint tenants, and a condo in Florida, which is held in the name of Murray's company. One of their children works in the company; the other lives overseas. When Murray consults his financial advisor about retirement, the advisor talks about the need for an estate plan. Murray is surprised: he thought all he needed was a Will.

While every adult should have a Will, not all assets a person owns, or has an interest in, will pass through that person's Will. For example, real estate that is held jointly as joint tenants will usually pass to the surviving co-owner by right of survivorship, not the Will. In this example, if Murray were to die, the house would automatically pass to Sara because of the manner in which they hold title to that property. Similarly, registered plans will pass to a named beneficiary, if the beneficiary survives the owner of the plan. How assets are held will affect how they pass and that in turn will affect a variety of planning considerations.

A key goal of estate planning is the transfer of wealth in an efficient manner. This usually involves a discussion about various tax minimization strategies. For example, assets that do not pass through the Will are usually not subject to probate tax. On the other hand, it may be advisable to pay some probate tax if the income tax considerations outweigh the probate tax considerations. An estate planner will ask: Is it more tax-efficient to have the asset pass outside the Will to save probate tax or is it more efficient to have the asset form part of an estate that can fund obligations of the estate or a trust for a beneficiary?

Family law must also be considered in an estate plan. For example, the Succession Law Reform Act of Ontario obliges everyone to make adequate provision for "dependants", who can be aging parents, current or former spouses, children, family members with disabilities, etc. Failure to make adequate provision for dependants may result in an expensive claim against the estate that will delay its administration and adversely affect the beneficiaries' interests.

Many factors will affect Murray and Sara's plan, including: tax implications, where the assets are located, where the beneficiaries reside, their marital status and the status of their beneficiaries, the age, health and wealth of their beneficiaries , and status of creditors. These personal considerations are unique to each family. There is no 'one size fits all' solution. For example, Murray and Sara have real estate in another country and an adult child resident overseas; their plan will differ from the plan for a family where all assets and beneficiaries are in Canada.

The key point is that a properly drafted Will is only one part of an estate plan. Failure to take important planning considerations into account may affect your objectives and result in an inefficient plan. At Lawrences, we have extensive experience in estate planning for a wide variety of different circumstances; call us to find out how we can help *you*.

Michael Prsa chairs Lawrences' Wills, Estates, and Trusts Group. A member of the Society of Trusts and Estate Practitioners, Mike focuses his practice on estate planning, estate administration and estate litigation. He can be reached at (905) 452-6880 or mjprsa@lawrences.com.

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Life at Lawrences®

Lawrences®' lawyers lead active lives in the profession and in the community. Here are some of their latest achievements.

25 Years at the Bar

Being called to the bar is a milestone: it's the day when young lawyers become licensed to practice law. Two of Lawrences' lawyers recently celebrated the 25th anniversary of their call to the bar: **Heather M. Picken** and **William G. Sirdevan** were articling students together at Lawrences in 1986 and were very proud to be hired back as associates after their call to the bar in 1987. Both began their legal careers in the firm's Real Estate Group. Bill later switched to the Corporate/Commercial Group and both now head their respective groups, which have flourished over the years. Heather and Bill join their partners **Edwin G. Upenieks**, **Michael J. Prsa**, and **Anthony E. Bak** in the quarter-century club. What a wealth of experience! Congratulations to Heather and Bill for their years of service.

In the Director's Chair

Lawrences' lawyers are well known for taking an active role in community organizations. **Heather M. Picken**, head of Lawrences' Real Estate Group, has been appointed to the Board of Hydro One Brampton Networks Inc., the utility responsible for supplying electricity to over 130,000 homes and businesses in the City of Brampton. As a director, Heather is also a member of HOBNI's Finance, Regulatory and Policy Committee. Congratulations on being appointed to this influential role, Heather!

At the Podium

2012 is proving to be busy for **Edwin G. Upenieks** of Lawrences' Litigation Group. On February 9, he co-chaired the Trust and Estates Seminars at the Ontario Bar Association's Annual Institute, which is the largest legal conference in Canada. On April 3, he gave a presentation entitled "Preparing Cost Outlines and Best Practices for Written Materials" at Dealing With Costs, a seminar for lawyers put on by the Law Society of Upper Canada. Ed is a recognized authority on legal costs.

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