FILLMORE RILEY
REPORT

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Purchaser Pitfalls Post-Possession:

How to Prevent the Application of Caveat Emptor

◆ *Janesca Kydd*

Imagine you've just purchased a home. Shortly after taking possession, you discover a large crack in your foundation or extensive water damage in your basement. What remedies are available to you?

We have all heard the expression *caveat emptor*, or "buyer beware". But does the doctrine of *caveat emptor* apply to you in these circumstances? Can't you back out of the deal or sue the vendor of the property? Or can you claim compensation from your realtor, the vendor's realtor or even your own lawyer?

Presumably, you just want the problem fixed as quickly as possible and you do not want to deal with legal headaches and courtroom dramas. You are busy enough trying to solve the problem in the basement. However, if you do not want to bear the entire cost of fixing the problem in the basement, a review of the legal documents signed in connection with your home purchase transaction must be made.

The first document you must look to in determining whether any remedy is available to you is the Residential Form of Offer to Purchase you entered into with the vendor.

The first document you must look to in determining whether any remedy is available to you is the Residential Form of Offer to Purchase you entered into with the vendor. The Residential Form of Offer to Purchase most commonly utilized in residential real estate transactions is one that is prescribed by law for use by realtors under *The Real Estate Brokers Act* (Manitoba). In this standardized form, spaces are made for the purchaser and vendor to insert certain conditions that are tailored to their unique situation. Purchasers often insert that the agreement shall be binding on them only after a building inspection is carried out and the purchaser is satisfied with the results of the building inspector's report.

If the conditions to the agreement are met or waived and the transaction is finalized (meaning that title is transferred to the purchaser and the purchase price is paid to the vendor), the terms contained in the Residential Form of Offer to Purchase are deemed to "merge" on the possession date (also known as the "closing" date). This doctrine of "merger" is intended to provide for finality of business affairs, meaning that after the closing date, neither the purchaser nor the vendor can sue the other for issues arising out of the transaction. However, one of the few exceptions to the doctrine of merger can be invoked if the Residential Form of Offer to Purchase specifically states that certain terms of the agreement are meant to "survive" closing and continue in full force and effect.

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In addition to the Residential Form of Offer to Purchase, potential purchasers may ask the vendor to complete a "Property Condition Statement", a standardized form also prescribed for use by realtors under *The Real Estate Brokers Act*. The Property Condition Statement is designed to provide potential purchasers with more information as to the status of the property for sale. Some of the questions to be answered by vendors in the Property Condition Statement are as follows:

- To your knowledge, during your ownership of the property, has there ever been any damage to the building due to wind, fire, water, moisture, insects or rodents?
- To your knowledge, has there ever been any flooding or leakage affecting any portion of the property from any cause or source?
- Are you aware of any cracking, shifting or movement of the structure that is not readily visible?

The statements in the Property Condition Statement serve as additional representations by the vendor to the purchaser with respect to the property in question. Note that the standardized language also includes a warning that the representations made in the Property Condition Statement should not be taken by the purchaser as a substitute for obtaining expert advice and that the purchaser must still make his own inquiries. However, courts have held that a purchaser who reasonably relies on the representations of the vendor made in the Property Condition Statement and suffers harm as a result will be entitled to compensation if:

1. the statements in the Property Condition Statement were specifically incorporated into the Residential Form of Offer to Purchase and were agreed to be excluded from merging on the closing date; or
2. the purchaser proves that the vendor deliberately misled the purchaser by the representations or omissions that he made in the Property Condition Statement.

Despite the protections that may be available to purchasers by inserting conditions of the sort referred to above in the Residential Form of Offer to Purchase, the reality is that the recent boom in the residential real estate market means that vendors can usually find a purchaser willing to provide a "clean" offer without conditions attached. Purchasers are therefore competing with one another to obtain the property that they desire, not only by frequently offering above the asking price, but by stating there are no conditions attached to their offer.

While such purchasers may be increasing their chances of obtaining the home they desire with an unconditional offer, they stand to lose the limited protections available in the event that an unpleasant problem arises requiring remedial work after the possession date. These purchasers are often left facing not only an unpleasant housing problem but also the doctrine of *caveat emptor*, leaving them with no recourse other than fixing the problem themselves.

The foregoing is intended as a mere snapshot of the legal consequences that may attach to the decisions made by purchasers as part of a standardized residential real estate transaction. The common expression that "every situation is unique" holds very true in the housing market. Depending on whether you are purchasing a used home, a new home or a condominium, there may be other documents and individuals that may be looked to should a housing problem arise after the possession date. For example, new home builders and developers often provide warranties in addition to the warranties that may be provided under a third party warranty program.

If you have already purchased a home and encountered an unexpected problem, you should consult your lawyer and the contractual documents to determine the potential remedies available to you. Meanwhile, potential purchasers about to make an unconditional offer should consider carefully whether they are prepared to deal with the consequences.

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Electronic Discovery

◆ Bernice Bowley

Electronic discovery, also known as "e-discovery", is an emerging issue in litigation that can have expensive and far-reaching consequences for clients.

In Manitoba, parties to litigation have an obligation to disclose all relevant documents that are or have been in their possession, control or power. A relevant document is one which relates to any matter in issue in a legal action. Our court rules define a "document" as including a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and information recorded or stored by means of any device. Therefore, a relevant document can include any and all documents and records stored electronically, including emails, voice mails, the contents of network servers, lap top computer hard drives, Blackberries and other personal electronic devices, as well as databases, backup tapes, CDs, DVDs and USB flash drives.

Our court rules define a "document" as including a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and information recorded or stored by means of any device.

Requests for disclosure and production of electronic documents and electronically stored information are occurring with greater frequency in litigation. The amount of such documentation, even in a relatively small company, can be enormous – think of the volume of email messages we exchange in a day. Depending on the issue, many of these electronic documents, in whatever form they are stored, will be relevant documents which must be located, viewed, organized and ultimately disclosed to the opposing party.

Interestingly, given the length of time computers have been in common usage, the recognition that electronic documents may be relevant to litigation came relatively late. The landmark American case of *Zubulake v. UBS Warburg LLC* brought the issue to the forefront, likely because the fact situation was so striking and the consequences so dire. The plaintiff alleged gender discrimination and retaliatory actions by her employer. She produced a large volume of internal company emails to support her allegations. UBS produced relatively few emails. A series of decisions emerged on preservation and disclosure of electronic documents. Essentially, the plaintiff argued that key evidence to support her case was contained in emails exchanged among various employees and that these emails existed on the company's backup tapes. She sought an order that the backup tapes be restored. UBS objected because the restoration costs would have been about $175,000, plus legal fees for its lawyers to review the emails.

The court ordered production and, not surprisingly, some of the backup tapes contained damaging evidence. Further investigation also revealed that other information on the backup

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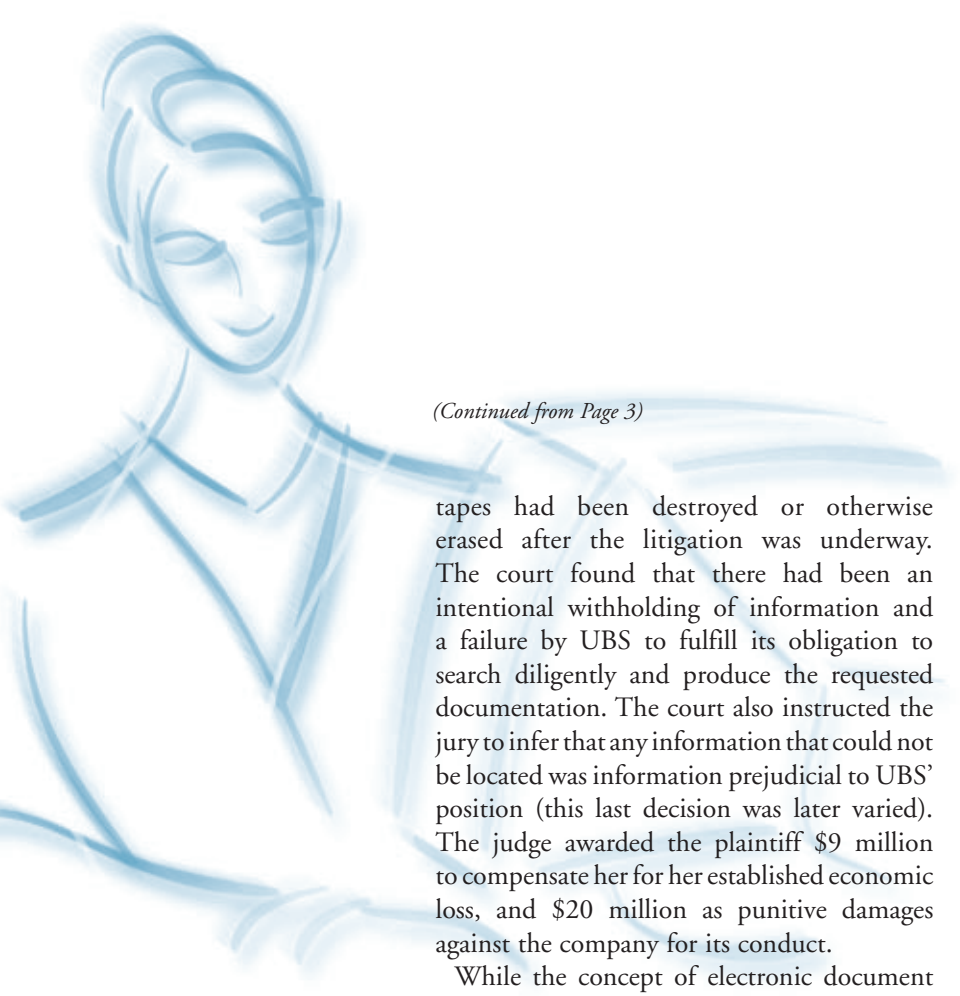

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tapes had been destroyed or otherwise erased after the litigation was underway. The court found that there had been an intentional withholding of information and a failure by UBS to fulfill its obligation to search diligently and produce the requested documentation. The court also instructed the jury to infer that any information that could not be located was information prejudicial to UBS' position (this last decision was later varied). The judge awarded the plaintiff $9 million to compensate her for her established economic loss, and $20 million as punitive damages against the company for its conduct.

While the concept of electronic document discovery may be more advanced in the United States, there have also been a number of high profile Canadian cases. Most of the decisions have dealt with such issues as the scope of a party's responsibility to produce electronic information, the duty to preserve electronic information, the form of disclosure and cost allocation between parties. Nonetheless, e-discovery is now a common issue in many litigation cases, although relatively few cases in Manitoba have gone before the courts.

Unfortunately, for many businesses, e-discovery often is dealt with in a "shutting the barn door after the horse has gone" kind of way; that is, dealing with disclosure of electronic documents after litigation has begun. A better approach would see businesses take steps to implement proper corporate policies and procedures for the preservation and storage of electronic documents before litigation occurs. There are at least two aspects to a proper electronic document policy, the first being general preservation rules and procedures, and the second involving preservation procedures to be implemented following the contemplation or commencement of litigation. These policies and procedures must be designed to handle the huge volume of documents and data which accumulate. A further complication is the need for electronically stored documents to be organized in such a way that relevant documents can be searched for and located with relative ease.

Unless both of these areas are covered, businesses can face overwhelming expenses when required to search for, review and produce relevant electronic documents. For example, commentators have noted that a corporate espionage lawsuit by Air Canada against WestJet Airlines was settled shortly after Air Canada was ordered to perform a manual review of 75,000 electronic documents to ensure they were not privileged before producing them for discovery. This occurred even though WestJet admitted that it inappropriately accessed some of Air Canada's private website material. Indeed, the cost of dealing with electronic documents can be so astronomical that commentators call e-discovery groundbreaking in its potential to cause "non-merit-based" settlements.

Whether it is email or other electronic information, people often think that the documents have been deleted, erased or otherwise destroyed. While those documents may not be available on their personal computer or hard drive, most data thought to be destroyed or deleted can usually be recovered, albeit usually at considerable cost.

A company's record retention policy should consider retention and destruction issues, the various sources of electronic documents

and how those documents should be stored or maintained. Some adopt a separate email policy. Consistency and compliance are key. For example, if a policy requires the automatic deleting of email messages after a certain period of time, any backup tapes containing these emails should also be deleted.

Consideration must also be given to an appropriate time period for storage of information in case litigation is commenced. It would not be reasonable or practical for a company to require all email messages to be destroyed, in whatever form, after one week. Courts called upon to examine a document retention policy will consider whether the policy is a reasonable one based on the facts and circumstances surrounding the relevant documents, whether the policy was adopted in good faith, and whether litigation was pending or contemplated. Thus far, there is no required number of years for electronic document retention. As a general guide, the length of retention should conform with applicable limitation periods or regulatory review periods. Generally speaking, if a company destroys documents pursuant to a routine policy, a court will not draw any adverse inference about that destruction.

A policy must also ensure that the electronic document is retained in its original form. There is concern about the integrity of electronic documents because they are susceptible to altering. Usually, a third party service provider can use forensic processes to determine whether an electronic document has been altered.

Whatever record retention policy or electronic document management system a company implements, it must be thoroughly communicated to employees and consistently enforced. Employees will require training and documentation of that training should be noted. Most companies use third party service providers with information technology experience to assist in developing their electronic document policies.

Once litigation is commenced and depending on the matters at issue, a business and its lawyer must immediately ensure that all relevant electronic information is preserved. A so called "litigation hold" must be imposed to ensure that no relevant material is destroyed or otherwise made inaccessible. IT staff or a service provider must take steps to ensure that hard drives, servers, back up tapes, etc. are preserved in their current state. Production of this information then needs to be organized and dealt with in as cost-effective a manner as possible. As with the implemention of a record retention policy, companies may use a third party service provider to perform these tasks.

Many service providers now exist to assist businesses in developing electronic information policies and procedures, including preservation and storage, as well as dealing with electronic documents once litigation has begun. Their services include document retrieval, retention, cost-effective data gathering strategies and services, electronic data restoration, and data organization and processing. Fillmore Riley LLP can provide interested clients with a list of vendors for electronic document services and assistance in developing policies.

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Contract Drafting in Lao PDR

◆ *K. Eleanor Wiebe, Q.C.*

The Canadian Bar Association (CBA) on behalf of its members deals with many issues affecting our legal system and lawyers in Canada. The CBA is also committed to issues pertaining to the law and legal profession beyond our borders and has an international development program.

Since 1990, this program has undertaken projects in over 30 countries located in the Caribbean, Central Europe, Africa and Asia, including involvement in Lao PDR. Since 2004, the CBA has been working with the Lao Bar Association to strengthen the rule of law in Lao, with particular emphasis on improving the skills of lawyers and the capacity of the bar association to deal with issues relating to governance of the legal profession.

This past fall, I was selected along with one practicing lawyer from each of Quebec and Ontario to act as a lecturer and facilitator for a contract drafting workshop in Lao. Our task as presenters was to work with the CBA's project director of international development to modify an existing contract drafting course that had been presented by the CBA in Cambodia some years earlier. We completed the week long training session in Vientiane, the capital city of Lao, during November 2007. Funding for the project was provided by the Canadian International Development Agency (CIDA) and the practicing lawyers donated their time.

Lao PDR has a population of under six million people. It is located in southeast Asia between Thailand and Vietnam and has the unfortunate distinction of being the most bombed country in history. During the Vietnam War, large parts of northern Laos were defoliated. Western governments, the People's Republic of China, banks and various non-governmental organizations contribute much of the current financial support for development. The president of Lao PDR is elected by the country's parliament, but the only legal political party in the country is the Lao People's Revolutionary Party. Their model of government includes a politburo and central committee. There are currently about 75 members of the Lao Bar Association. The role of the legal profession in Lao is emerging and the role of the lawyer as an advocate is a concept new to the public, as the Lao Bar Association was only established in 1996 under the supervision of the Ministry of Justice. Prior to 1996, all legally trained individuals worked for the government, although there was an arm of the Ministry of Justice which provided legal advice to the public.

The Lao bar had identified the topic of contract drafting as one of particular interest. In recent years, there has been increasing foreign investment in Lao PDR, making written contracts with international parties more common. Lawyers speak and work in the language of Lao. Each morning during the training week, a lecture and accompanying PowerPoint presentation was given by one of the practicing Canadian Bar members. These were presented through translators. Following the lecture portion, the participants were divided into three groups and each group was assigned one Canadian lawyer and a translator. The groups then worked to complete drafting exercises. The exercises were designed so that they built on each other day-to-day. By the end of the week, a simple but complete contract dealing with a fact situation had been developed. The participants drafted in the Lao language and translators assisted, so the presenters and the other participants could criticize and revise as a group.

As the week progressed, the message for the participants reinforced by the Canadian lawyers was two-fold:

1. When drafting any contract, it is critical to review the local law to determine if it limits the freedom of the contracting parties or imposes any particular obligations on them; and
2. Identifying the problems that need to be addressed or negotiated in any contract is more difficult than drafting the contract itself.

While cultural differences and the basic level of training of Lao lawyers presented challenges, the enthusiasm of the Lao Bar to learn and develop their skills was refreshing and rewarding. Attention and attendance continued throughout the week. Our hosts were welcoming and gracious.

While in Vientiane, I also was invited to give a lecture on practicing law in Manitoba to students in the Faculty of Law and Political Science, National University of Laos, where the Swedish International Development Cooperation Agency runs a project to assist in the training of law students. Again with the assistance of a translator, I shared with the students information about the education of lawyers in Manitoba, the requirements for gaining admission to the University of Manitoba's Faculty of Law, the articling process, the role of the Law Society of Manitoba in governing the profession, our judicial system and the practice of law at Fillmore Riley LLP. The lecture was well received. I also presented a PowerPoint slide show that included photographs of Winnipeg's downtown, classrooms at the Faculty of Law, Queen's Bench courtrooms at our Law Courts Building, snow and hockey, all of which generated interest and highlighted the differences between the legal and judicial systems, climate and culture in our respective countries.

As senior members of the Lao Bar do not have the level of training, expertise or experience found in many developed nations, the assistance of the CBA is invaluable. On a personal level, this trip provided me with an opportunity to share my expertise with colleagues and law students in Lao, in an effort to strengthen the legal profession in that country. It was a unique and memorable experience.

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FILLMORE RILEY NEWS

A number of lawyers at Fillmore Riley LLP were named in the 2008 edition of *The Best Lawyers in Canada*. Those recognized were **Bob McDonald**, **Charles Sherbo** and **Stuart Blake** in the specialty of Insurance Law; **Tim Dewart** in the specialties of Banking Law, Corporate Law and Real Estate Law; **Cy Fien** in the specialties of Tax Law and Trusts & Estates; **Wayne Leslie** in the specialties of Corporate & Commercial Litigation and Insolvency & Financial Restitution; **Mickey Rosenberg** in the specialty of Real Estate Law; and **Rob Simpson** in the specialties of Construction Law and Labour & Employment Law.

Norm Yusim lectured on Ethics & Professionalism and Interviewing Skills for the Law Society of Manitoba's Canadian Centre for Professional Legal Education program for Articling Students. **Anita Southall** lectured on Motions Court Advocacy.

Steven Raber participated in the Mentorship Program available to first-year students at the University of Manitoba's Faculty of Law.

Dan Ryall was elected as a Director of the Canadian Transportation Lawyers' Association.

Shayne Berthaudin and **Dean Giles** served as seminar leaders for the University of Manitoba's Faculty of Law Advocacy Course.

Cy Fien presented a paper at the Isaac Pitblado Lectures on the tax ramifications associated with the termination of employees.

Tony Fletcher spoke at and conducted a seminar entitled "Causation as an Element of Negligence-Going, Going, Gone!!" at the Canadian Independent Adjusters' Assocation Annual General Meeting and Conference held in Winnipeg.

Bernice Bowley, **Stuart Blake** and **Tony Fletcher** spoke at the joint Risk Management Counsel of Canada/Fillmore Riley LLP seminar entitled "Insurance Today and Legal Trends"

Stuart Blake presented a paper entitled "Social Host Liquor Liability" at the Annual Meeting of CAA Manitoba.

Johanna Charles will be clerking for the Honourable Mr. Justice Rothstein at the Supreme Court of Canada for 12 months, beginning in January of 2008.

Janesca Kydd was appointed to the Board of the First Peoples Economic Growth Fund Inc., a non-share capital corporation created by the Assembly of Manitoba Chiefs and the Manitoba Government. The purpose of the Fund is to improve the general economic well-being of First Nations peoples living in Manitoba by encouraging, promoting and developing business and economic opportunities for Manitoba First Nation Bands and their members. Janesca also was appointed to the Board of Directors of the Canadian Condominium Institute (Manitoba Chapter).

Fillmore Riley LLP, through **Steven Raber** and **Peter Davey**, has committed to the corporate sponsorship of the University of Manitoba's Smartpark Eureka Project. The project is an "incubator" of start-ups at Smartpark Research and Technology Park on the doorstep of the University of Manitoba. The incubator is home to ten high-tech companies in the areas of nutritional and agricultural sciences, information and communications technology, engineering and advanced materials, health and biotechnology, and environmental solutions. Steven recently spoke to senior management of the participating companies in relation to trade-mark, trade secrets, patent, industrial design and copyright issues.

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