1997 S.H. No. 136091

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

RUSSELL CLIVE KEIRSTEAD

PLAINTIFF

- and -

STEPHEN D. PIGGOTT, a Barrister & Solicitor

DEFENDANT

- and -

ALEXANDER JOSEPH INNOCENTE and GWENDOLINE ANN INNOCENTE

THIRD PARTY

- and -

CHRISTOPHER FLEMMING

FOURTH PARTY

DECISION

HEARD BEFORE: The Honourable Justice David W. Gruchy at Halifax, Nova Scotia

DATE(S) HEARD: March 29, 30, 31, April 1 and 27, 1999

DECISION DATE: May 6, 1999

COUNSEL: John E. MacDonnell for the Plaintiff

J. D. MacIsaac and Mary Ellen Greenough, articled clerk for the Defendant

Dennis F. Ashworth for the Third Party

GRUCHY, J.:

Factual Overview

The plaintiff is a retired school teacher who resides in Prince Edward Island. In 1992 he bought a 50 acre parcel of land at Ketch Harbour, Nova Scotia from the third parties, Alexander Joseph Innocente and Gwendolyn Ann Innocente. He retained the defendant, Stephen Piggott, a solicitor to act for him. As the property in question does not abut on a public road Mr. Keirstead inserted a clause in the agreement of purchase and sale specifying that his solicitor was to be satisfied "that there is a legal registered access to the property".

After the transaction closed Keirstead received a certificate of title from Piggott. He commenced activity toward the subdivision of the land and the construction of a home. As his activity progressed, he met the fourth party, Christopher Flemming, who owned the property over which his only access to the land lay. Flemming informed him he did not have a legal right-of-way, but was prepared to allow him access. Flemming had usually kept the road closed with either a gate or a chain. Flemming provided Keirstead with a key to the chain. In due course, however, Keirstead attempted to obtain electrical power but was refused by Nova Scotia Power Corporation as he did not have an appropriate right-of-way.

There then followed a series of events which I will outline below ultimately leading to this action by Flemming against Piggott, who in due course added Mr. and Mrs. Innocente as third parties, Keirstead then added Mr. and Mrs. Innocente as defendants. Mr. and Mrs. Innocente then added Christopher Flemming as a fourth party on the basis that he had agreed to give Mrs. Innocente a right-of-way across his property.

In this decision I will refer to the parties by their names rather than by their status in the action.

The Pleadings

1. On February 27, 1997, Keirstead commenced this action against Stephen Piggott essentially on the basis that he had been specifically instructed to search the title and to be satisfied "... on or before the closing date that there is a registered legal access to the property".

Keirstead alleged in his statement of claim that the lands which he purchased from Mr. and Mrs. Innocente did not include any such right-of-way (registered or otherwise) and he was therefore prevented from making use of the lands as he had intended. Keirstead alleged that Piggott was negligent in the performance of his undertaken solicitor's duties and that he had as a result suffered loss and damage.

2. Piggott filed a defence on April 7, 1997 in which he denied Keirstead's claim and pleaded that Flemming had no right to prevent Keirstead from using a right-of-way, "which right-of-way was saved and excepted from and out of a certificate issued pursuant to the *Quieting of Titles Act* dated December 11, 1985 in SH No. 53197". Piggott denied that Keirstead had suffered any damages and took the position that he had not been negligent in the performance of his duties as solicitor.

3. On April 7, 1997, Piggott issued a third party statement of claim against Mr. and Mrs. Innocente. While he denied Keirstead's allegations he claimed that in the event that he was held liable to Keirstead, Mr. and Mrs. Innocente would owe him contribution and indemnity. He pleaded that Mr. and Mrs. Innocente had warranted the title to Keirstead and in particular had warranted that the property had a "right-of-way for persons and vehicles to pass and repass at all times and for all purposes over the road which runs from the public highway known as East Ketch Harbour Road to the property hereby conveyed". Piggott accordingly claimed over against Mr. and Mrs. Innocente as they had failed to convey a legal registered access as required by the agreement of purchase and sale, had breached the warranty of the deed to Keirstead, had represented that they had the right to grant a right-of-way when they knew or ought to have known there was no such right-of-way and failed to inform Keirstead that they had been denied the use of the right-of-way by Flemming. Piggott therefore claimed against Mr. and Mrs. Innocente for a declaration that he is entitled to be indemnified by them for any amount which he may be required to

pay to Mr. Piggott, or for a declaration that he is entitled to receive from Mr. and Mrs. Innocente such contribution as may be found by this Court. He also claimed judgment against Mr. and Mrs. Innocente for any amount which may be awarded to Mr. Keirstead against him or for such contribution as may be ordered.

4. On April 30, 1997, Mr. and Mrs. Innocente filed a defence by which they denied each and every claim of Mr. Piggott against them. In addition, they denied that there was no right-of-way, that they had breached the warranty, that they had made any representations and that they had been denied the use of a right-of-way. They claimed that no contractual relationship existed between them and Mr. Piggott to create any legal obligation to him.

5. On May 1, 1997, Mr. and Mrs. Innocente joined Flemming in this action by a statement of claim by which they said Flemming had agreed on July 16, 1986 to give to Gwendolyn Innocente a right-of-way. They also claimed that they had agreed to a quieting title order of the Flemming property because of a representation made to them by Flemming's solicitor and that in fact a road existed which had given them access. They claimed indemnity from Flemming.

6. On January 22, 1998, Keirstead amended his statement of claim whereby he claimed damages against Mr. and Mrs. Innocente on the basis that they had represented

that they had a right-of-way across the Flemming property and that they had breached their agreement and had breached the warranty contained in the deed. He therefore claimed damages against Mr. and Mrs. Innocente.

7. On February 6, 1998, Mr. and Mrs. Innocente filed a defence to Keirstead's action against them.

8. In March, 1999, it was agreed that Mr. and Mrs. Innocente could amend their statement of claim against Flemming to ask for an order of specific performance and a declaration that a right-of-way exists.

9. In the first day of trial, I was informed that the parties had settled with Flemming and a right-of-way had been acquired for Keirstead. Flemming is no longer a party to this action.

Agreement of Purchase and Sale

In 1992 Keirstead learned of the property in question. He sought out Mr. and Mrs. Innocente and met them at their home. Keirstead and Mr. Innocente then went to the property and looked it over. Keirstead was aware that the access to the property was through a road through other private property and knew the Innocente property did not abut a public road. He observed that the access to the property had been blocked by a chain.

Keirstead said, and I accept, that Mr. Innocente assured him the property had a right-of-way to the public highway.

Keirstead and Mr. and Mrs. Innocente then reached an agreement. Keirstead would pay $165,000.00 for the property which consisted of approximately 50 acres. He would pay $50,000.00 down and Mr. and Mrs. Innocente would take a mortgage back from him for $115,000.00 with interest thereon at 8% amortized over 20 years, repayable in 6 years, with monthly payments of $952.61, the first of which payments to be made September 12, 1992, and the balance to be paid on August 15, 1998.

Before formalizing the transaction, Keirstead contacted and retained Piggott. who advised Keirstead and gave him the exact wording to be used in completing the standard form of the Nova Scotia Real Estate Association agreement of purchase and sale. Keirstead was express in his instruction about the right-of-way. Accordingly, Piggott advised that the agreement should include the condition that it would be "... subject to purchaser's solicitor being satisfied on or before the closing date that there is a legal, registered access to the property." Keirstead then presented the offer to Mr. and Mrs. Innocente on May 13, 1992.

Mr. and Mrs. Innocente took the Keirstead offer as presented to their solicitor Mr. Anthony Chapman on the same date who witnessed their acceptance of it.

Legal Work

Chapman and Piggott then corresponded routinely concerning the proposed purchase and Piggott arranged for the search of the title. During the exchange of documents between the solicitors, Chapman supplied to Piggott a copy of a confirmatory deed dated January 5, 1987 from Eva Catherine Flemming and Nellie Cecilia Flemming to Gwendolyn A. Innocente. This deed contained a legal description to the lands in question and granted and confirmed a right-of-way. Strangely, Piggott looked at and relied upon this deed but title notes received from his paralegal drew attention to the fact that the plan mentioned in it did not seem to refer to the lands in question. I will examine the deed in more detail below.

In due course Piggott obtained notes from his title searchers and when he received a plan of survey which had been prepared for Innocente by a surveyor named Purcell a new description of the lands was drafted.

During correspondence Chapman forwarded to Piggott a copy of a letter dated January 2, 1991 from the Director of Planning and Development of Halifax County Municipality to Mr. Innocente, in part as follows:

> I did back track all of your efforts some time ago, and along the way, found that you had indeed pursued all options with various staff people here. Members of staff were familiar with the situation.

> I cannot, however, offer any new leads and the best advice as to the status of the 'roadway' is that which you had already received. Even though there may have been some type of access beyond the public right-of-way, it does not carry any public status at this point. Your land remains eligible therefore, for subdivision into two lots as you had been previously advised.
>
> In response to my inquires about bringing the existing portion of the roadway up to public standard, the Municipality's surveyor indicates that there was also some investigation of that previously, with the result that property owners were not willing to deed the required land to the Municipality. He recalls that you were involved in this attempt.

Piggott requested various clarifications of title from Chapman including one concerning the grantors' names in the confirmatory deed. He raised no question as to the sufficiency of the conveyance of the right-of-way. Chapman replied and pointed out to Piggott the provisions of s. 13(d) of the *Conveyancing Act*. Chapman's conclusion, with which Piggott apparently agreed, was that the confirmatory deed had not been required with respect to the easement by virtue of this provision.

On August 6, 1992, Mr. Marc J. Belliveau, for Chapman, forwarded to Piggott a copy of a plan showing the lands of Gwendolyn A. Innocente, Charles Flemming and Stanley Flemming in Ketch Harbour, Halifax County, dated December 1981. On August 10, 1992, Mr. Belliveau forwarded to Piggott a revised legal description of the property which he apparently took from the Purcell plan.

On August 17, 1992 the property transaction closed and the required funds were forwarded in return for the deed to the property.

Piggott's property search notes disclose no information with respect to the Flemming lands over which the road crossed. In testimony before me Piggott acknowledged that there had been an error in not searching that title for the right-of-way.

The conveyance from Alexander Joseph Innocente and Gwendolyn Ann Innocente to Russell Clive Keirstead is a standard form of warranty deed. The description of the property includes the following:

> Together with a right-of-way for persons and vehicles to pass and repass at all times and for all purposes over the road which runs from the public highway known as the East Ketch Harbour Road to the property hereby conveyed.

On September 8, 1992, Keirstead executed a mortgage to Mr. and Mrs. Innocente in the amount of $115,000.00 in accordance with the terms agreed upon.

Piggott certified to Keirstead that the property as described had a good and marketable title subject, *inter alia*, "to a right-of-way for persons and vehicles as described in (your) deed". He acknowledged in testimony that the certificate was poorly worded but

the intention was that the property in question had a right-of-way as described but was not subject to same as this wording stated.

Keirstead's Activities

Having purchased the property, Keirstead started to move onto it. In early October 1992, he inquired of Piggott about the locked chain and was referred to Flemming who would give him a key to obtain access through the chain. Keirstead made certain investigations on his own concerning the possibility of subdividing the property, but that subject is not especially germane to my considerations.

In the Fall of 1992 Keirstead and Flemming spoke about the chain He understood from Flemming that it was kept there to prevent vandals from entering the property and dumping trash there. During the Fall of 1992 and the Spring of 1993, however, Keirstead became more and more aware of the nuisance of the chain and eventually Flemming informed Keirstead that he really did not have a right-of-way to the property. Initially Keirstead did not take Flemming's assertion too seriously. He discussed it from time to time with Piggott but by December 1993 he recognized that he had a problem. Piggott assured him that he had a valid right-of-way to his property and that he should ignore Flemming. Keirstead and Piggott talked this matter over on a number of occasions - Keirstead said 6, 8 or 10 times. Flemming became more and more insistent and Keirstead

wanted to understand what Flemming was talking about. At first he thought that Flemming was simply trying to make an unfounded claim against him.

In the meantime, Keirstead was working on the property. He brought his backhoe over from Prince Edward Island, cleared a trail or road, arranged to have some grubbing done and brought gravel onto the property and levelled an area. He personally cleared a considerable length of road with his chainsaw and axe. He moved a small trailer onto the property where he could live while working there.

In December, 1993, the situation between Keirstead and Flemming reached such a stage that Keirstead contacted Piggott at home and complained of the difficulties he was having with Flemming and his assertions that he did not have a right-of-way. As a result of inquiries, Piggott began further investigation into the titles. He was initially assured that the road was of long standing but then learned for the first time that Flemming's title had been the subject of a Quieting Title application. On December 6, 1993 and again on February 15, 1994, Keirstead wrote to Piggott documenting the difficulties he was experiencing. On December 6, 1993, Keirstead was explicit: as a result of the Flemming claims he was put to considerable inconvenience and expense and was prevented from proceeding with the construction of his house.

On April 25, 1994, Piggott advised Keirstead that he was having title searchers again review the title to the property but in the meantime his firm would stand by its certificate of title and it was in order to proceed with development.

Piggott examined the Quieting Titles certificate and found it made no mention of a right-of-way and contained no reservations with respect to the Keirstead property.

On May 4, 1994, Keirstead wrote to Piggott and complained about the situation. He forwarded a copy of a map outlining the situation together with two letters addressed to him (at his request) by Flemming setting out Flemming's claim .

Shortly after receipt of Flemming's letters Piggott sought a copy of the plan prepared by John McElmon, NSLS dated January 16, 1973, which had been referred to in the confirmatory deed dated January 5, 1987.

In early 1994, Piggott unsuccessfully attempted to negotiate with Flemming and another neighbour for the formalization of a right-of-way agreement. In addition to the foreseeable difficulty experienced by Keirstead in failing to have a right-of-way to the lands for ordinary access, Keirstead was also experiencing difficulty obtaining a right-of-way for electrical power to the property.

In June, 1994 Flemming refused to convey a right-of-way to the Nova Scotia Power Corporation unless it was part of a "complete deal". Keirstead, understandably, became very insistent with Piggott the matters be resolved. Shortly thereafter Keirstead wrote to Piggott (June 23, 1994) and asked for a statement of his position. Piggott replied on July 13 in which he made certain suggestions, but asserted that his firm had offered no opinion or certification as to the provision of utilities and suggested that while he would continue to offer his time and efforts without charge, if the matter required a court application Keirstead would be responsible for litigation fees and disbursements.

On July 27, 1994, Piggott wrote to Flemming and, in effect, demanded a right-of-way, remarking that at the time of Flemming's application for quieting of title Mrs. Innocente "... was assured in writing by the lawyer acting on (Flemming's) behalf that there would be no adverse affects (sic) ..." on the property. He took the position that the quieting of the title encroached upon Mrs. Innocente's rights and Flemming owed an obligation under that undertaking. He demanded that Flemming sign a Nova Scotia Power Corporation easement within 10 days or an action would be taken to have the matter resolved.

Flemming then sought legal advice from John Chandler, Q.C. who took the position that Mrs. Innocente did not have access by right to the property, and that the assurance at the time of the quieting of the title that it would not have any adverse effect on the

Innocente property "was no doubt correct" as existing rights would be preserved but that additional rights would not accrue.

At a meeting on September 28, 1994, of Chandler, Flemming and Piggot, the matter of the confirmatory deed of January 5, 1987 was discussed. It then became clear that the right-of-way referred to therein and as shown on the McElmon plan is not related to the property in question at all.

Further efforts were made by various people to resolve the matter of the right-of-way, but without success. Eventually, the relationship between Piggott and Keirstead dissolved and this matter proceeded to litigation.

Mrs. Innocente's Title

On December 31, 1980, Gwendolyn Innocente obtained a deed of her land from various Flemming heirs. In November and December 1981, Mrs. Innocente had the property surveyed by Purcell as referred to above. Flemming said in evidence, and I accept, that at the time of this survey it was clear to him that there was no right-of-way across his lands to the Innocente property. I also infer that Purcell informed Mrs. Innocente of the lack of a formal right-of-way.

On August 14, 1984 Flemming's then solicitor, M. Heather Robertson, wrote to Mrs. Innocente indicating that Flemming intended to proceed with a Quieting Titles application for his land, which application "...would not encroach on your lands as an abutting neighbour". Mrs. Innocente said in her evidence that Flemming had approached her prior to this letter and indicated that he intended to have the title quieted to which she responded that she would like to have a letter from his lawyer. In fact, the Quieting Titles certificate and order were not granted until December 11, 1985. In the meantime, there were dealings between Flemming and Mrs. Innocente. In May, 1985, Mrs. Innocente's lawyer, Jonathan Davies, prepared a grant of right-of-way from Flemming to Innocente and forwarded the same to Mrs. Innocente. That document was never executed. At or about the same time, Mr. and Mrs. Innocente and Flemming considered the possibility of subdividing their respective properties, but ultimately the cost of such a development was found to be prohibitive and they abandoned that idea. During the consideration of the plan for subdivision, however, (and it is important to note) Mr. and Mrs. Innocente sought and obtained legal advice about the right-of-way prior to the granting of the Quieting Titles certificate. Clearly, (and I find as a fact) Mrs. Innocente had been concerned about the right-of-way situation. Eventually, on October 24, 1985, Alexander J. Fraser on behalf of Flemming gave formal notice of the application under the *Quieting of Titles Act* to Mr. and Mrs. Innocente. He indicated in his covering letter that they "may contest Mr. Flemming's claim if you feel you will be adversely affected".

In July, 1986, while Flemming and Mr. and Mrs. Innocente were still considering the possibility of a subdivision, Flemming executed a document prepared by Mrs. Innocente in which he agreed "...to give Gwendolyn Innocente, the required amount of property as required by the Department of Transportation, Province of Nova Scotia the required amount to bring this private road up to requirements and standards of said Department." It is common ground between Mr. and Mrs. Innocente on one part and Flemming on the other that this document was signed for the purpose of allowing Mrs. Innocente to approach the Department of Transportation about the proposed subdivision. It is also common ground that similar documents would have to be signed by other owners of property abutting on the proposed road, which were never obtained.

Prescriptive Right-of-Way

Some evidence was led before me dealing with the claim that the right-of-way in question had been obtained by long-term use. In view of my findings below with respect to the effect of the Quieting Titles certificate, it is unnecessary to deal with the facts of this subject extensively. For reasons which I will set forth, I find and decide that certificate eliminated all claims against or over the property described, including any prescriptive rights-of-way. Alternatively, I found the evidence of a prescriptive right-of-way unconvincing. I was not persuaded by the evidence before me that there had been sufficient usage, either in quality or in length of time, to establish a prescriptive right-of-way.

A.G.H. Fordham, Q.C., presented a paper to Continuing Legal Education on April 11, 1987, in which he addressed the matter of *Easements, Licenses and Rights-of-Way.* In regards to rights-of-way by prescription, Mr. Fordham said:

> *Prescription*
>
> An easement can also be created by prescription, that is, by continuous use over a long period of time. Although the practical result of this doctrine is the same as the doctrine of adverse possession, whereby title to land is, in effect, acquired by long use, the theory underlying acquisition of easements by prescription is very different than the theory underlying acquisition of title by adverse possession.
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> When one claims title by adverse possession, one relies totally on the *Limitation of Actions Act* which terminates the right of the true owner to recover property after having been dispossessed for those periods of time mentioned in the *Limitation of Actions Act.* The doctrine of adverse possession is, consequently, a negative doctrine, because under that doctrine, the true owner's rights are extinguished pursuant to statute.
>
> The doctrine of acquisition of easements by prescription is, however, positive although it was born and developed out of a fiction created by the courts.

Mr. Fordham then explained the development of the common law of easements and continued:

> What type of use, therefore, is necessary in order to acquire an easement by prescription? If at the end of the day, the court concludes that the owner of the property has acquiesced in the use, then the court will declare that an easement has been created by prescription. In *Dalton v. Henry Angus & Co.; Com'rs of Her*

Majesty's Works and Public Buildings v. Henry Angus & Co., (1881), 6 App. Cas 740, H.L., Fry, J. said (at pp. 773-774):

> ...in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The Court and the Judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest. It becomes then of the highest importance to consider of what ingredients acquiescence consists... I cannot imagine any case of acquiescence in which there is not shewn to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power.

C. W. MacIntosh, Q.C., in his text, *Nova Scotia Real Property Practice Manual*, addressed the matter of easements by prescription as follows:

> [7.2] EASEMENT BY PRESCRIPTION
>
> An easement is created by grant, whether express, implied or presumed. An easement which is the subject of a presumed grant is one created under the doctrine of prescription. The criteria for establishment of a prescriptive easement were adopted from the civil law and are of ancient origin. The user must be 'nec vi, nec clam, nec precario.' In modern terms this means that the user must be neither violent, nor secret, nor permissive.
>
> Before an easement will arise by prescription, the claimant must show user 'as of right', meaning enjoyment of the land as if he were

the true owner. The use must be open, adverse, notorious and continuous and not secret. A prescriptive easement will not arise if the use has been with the permission of the owner.

The establishment of an easement by prescription is distinguishable from the acquisition of possessory title by adverse possession under s. 9 of the Act. The adverse use of an easement does not result in dispossession or extinguishment of the owner's title to the piece of land. Further, the adverse use of the easement must be for the benefit of the adjacent land, whereas adverse possession does not depend for its existence on other land which will benefit.

In Nova Scotia, prescriptive easements may arise in two ways: under the doctrine of lost modern grant or under s. 31 of the *Limitation of Actions Act*. The former is a judge-created theory which presumes that if actual enjoyment has been shown for 20 years, an actual grant had been made when the enjoyment began, but the deed granting the easement has since been lost. However, the presumption may be rebutted.

Section 31 of the *Statute of Limitations* is as follows:

...

A claim under this section is based on 20 years adverse user. This statutory provision was enacted as a simpler alternative to, but not a replacement for, the lost modern grant. In many cases both methods apply, but the latter may be relied upon where evidence required to prove a prescriptive title is defective.

Section 31 establishes two periods, 20 and 40 years, for the creation of a prescriptive easement. With regard to the 20-year period, the section provides that the easement may not be defeated by showing that it had first existed at any time prior to the 20-year period. The provision exists because of the English common law which provides that a grant of easement would be presumed if the enjoyment could be shown to have existed since time immemorial, which meant 1189. The common law presumed such long-term enjoyment is 20 year's use could be proved. However, the presumption could be defeated

> by showing that the adverse use did not exist some time after 1189. The Statute has eliminated the availability of this defence. It should be noted that prescription at common law is not available in Nova Scotia, where legal memory does not go back to 1189.
>
> After 40 years use in the easement is deemed to be 'absolute and indefeasible' and cannot be defeated by abandonment, non-user or interruption.
>
> Section 31 operates only when there is litigation; in order to establish a prescriptive right, an action must be brought. Pursuant to s. 33, the relevant period of user must immediately precede the bringing of the action. Section 33 also states that the period of user must be without 'interruption.' Interruption means that the claimant has been obstructed from using the easement and not mer discontinuance of the user. As with the doctrine of adverse possession of land, the required period of user need not run in favour of one person. User by successive owners of the dominant tenement for the 20 years will support a claim for easement by prescription.

As stated above, I am far from persuaded that a prescriptive right-of-way existed prior to the Quieting Titles certificate, but if such did exist, it has now been extinguished.

Effect of Quieting Titles Certificate

Whatever the state of Flemming's title prior to December, 1985, and no matter what rights-of-way existed either by virtue of title or by virtue of prescriptive rights, on December 17, 1985, that title was cleared, subject to only certain reservations irrelevant to this matter. On that date, the Quieting Titles order of this court was recorded at the Registry of Deeds in Halifax. The introductory words of that order are:

> This is certify pursuant to the Quieting Titles Act that Christopher F. Flemming of Ketch Harbour, in the County of Halifax, Province of Nova Scotia, is entitled to the ownership in fee simple in the following lands ..."

Section 16 of that *Act* reads:

> 16 (1) A certificate of title, when it has been issued and registered in the registration district in which the land lies, is binding and conclusive upon all persons, including the Crown, and whether named in the action or not, and, except as is herein otherwise provided, the same is not liable to be attacked or impeached at law by any person whomsoever: the title mentioned in the certificate shall be deemed absolute and indefeasible on and from the date of the certificate as regards the Crown and all persons whomsoever, subject only to any charges, encumbrances, reservations, exceptions or qualifications mentioned in the certificate, and is conclusive evidence that every application, notice, publication, proceeding, consent and act that ought to have been made, given and done before the granting of the certificate has been made, given and done by the proper person.

A search of the title of the Flemming lands would have revealed the certificate and would have alerted a competent and prudent solicitor to the fact that any right-of-way (assuming one had existed) had been extinguished. The status of a fee simple title is inconsistent with the encumbrance of a right-of-way. It is my conclusion that Piggott was negligent in that he failed to search the title of the land over which the right-of-way would have run, assuming it existed. Piggott failed to comply with Keirstead's instructions as found in the agreement of purchase and sale.

Mr. and Mrs. Innocente testified, in effect, that they were misled into either consenting or not objecting to the quieting titles application. They point to the letter from Flemming's solicitor dated August 14, 1984, to which I have already referred.

The following points should be made with respect to that letter.

1. It was written on behalf of Flemming. At the first day of trial Flemming was released from this action. I understand that Flemming's release was absolute. If any rights might have accrued to Mr. and Mrs. Innocente as a result of the letter they have now been released.

2. Mr. and Mrs. Innocente knew prior to the Quieting Titles application that there was a considerable question about the existence of any right-of-way across Flemming's land. Between the date of the letter and the application they had legal advice concerning it. They had an opportunity to object to the application and did not do so.

3. Even putting a sinister interpretation on the letter and assuming it was a false representation (and I expressly do not so interpret it) its effect would be governed by s. 17 of the *Quieting Titles Act* which reads in part as follows:

> 17 (1) Any person, who claims to have been deprived of any property right by the certificate of title, may apply to the court or a judge, within one year after the registration of the certificate in the

> registry of the district in which the land lies, to have the certificate set aside on the ground that it was obtained by fraud.
>
> (2) The court or judge, if satisfied that the certificate was obtained by means of a false representation known to be false by the plaintiff or the plaintiff's agent or by a wilful withholding of material facts or evidence by the plaintiff or the plaintiff's agent, may set aside the certificate of title.
>
> (3) A certificate of title that has been set aside for fraud is void and of no effect from the date of issue, but this does not affect the rights of any person who has purchased the land or any interest therein for valuable consideration and without notice of the fraud before the certificate was set aside.

Effect of the Confirmatory Deed of January 5, 1987

The conveyance by various Flemming heirs on December 31, 1980 to Gwendolyn Innocente of the land in question contained no reference to a right-of-way. Faced with difficulties arising from that deficiency Mr. and Mrs. Innocente sought and obtained the confirmatory deed of January 5, 1987 this deed purported to "grant and confirm" to Mrs. Innocente the land conveyed in 1980 with the addition of the right-of-way. There are several problems and defects in or arising from this conveyance.

1. It is a conveyance without any covenants; in effect it is a quit-claim deed. Such a form of deed usually should alert a competent and prudent solicitor to a possible difficulty and should be taken as a signal to explore the title further. While Mr. Piggott did search the title in an exemplary fashion he failed to do the same with respect to the right-of-way.

2. In my view the recital that the grantors "always enjoyed and used" a right-of-way ought to have alerted a careful title searcher to a potential problem as it does not contain sufficient factual information to give rise to a conclusion that a prescriptive right existed. The assertion of rights obtained by prescription usually requires evidence of the kind referred to by Mr. Fordham in his paper. The voluntary granting of access by a property owner does not lead to the conclusion of a prescriptive right. Indeed, the act of permitting a right of access is an act of ownership, particularly when accompanied by the acquiescence of the party exercising the access.

3. It is common ground that the right-of-way shown on the McElmon plan of January 16, 1973, does not serve the land in question; indeed it is some 1,000 feet away from it. The plan was recorded and ought to have been examined by a competent and prudent solicitor. Failure to do so and to recognize the problem created by this error was negligence.

4. The inaccuracy of the recital in the deed ought to have alerted Piggott to a problem. The use of the right-of-way as it was described in the recital was impossible. The grantors were mistaken either in the location of the land purportedly served by the right-of-way or in the location of the right-of-way.

No firm conclusion as to the validity of the right-of-way should have been drawn from this deed. Piggott's failure to recognize the defects of this deed was negligence.

Conclusions

Some of my conclusions with respect to liability require an examination of credibility of witnesses. Keirstead impressed me as an accurate witness and where his testimony differs from that of other witness I accept Keirstead's. Piggott's evidence struck me as candid and forthright. Any little differences between his evidence and Keirstead's should be attributed to minor lapses. I also found Flemming's evidence very acceptable. He knew more about the history of the properties in question than any other witness and I accept his testimony as factual and truthful. Where the evidence of any of these three witnesses differs from that of Mr. or Mrs. Innocente I accept the former.

a) Solicitor's Liability

In forming my conclusions with respect to Piggott's liability, I have especially referred initially to the decision of Henry, J. in *Banks v. Reid* (1974), 53 D.L.R. (3d) 27 (Ont. H.C.), p. 34:

> Generally speaking, a solicitor holds himself out to his client as possession adequate skill, knowledge and learning for the purpose of conducting all business that he undertakes. He is not, however, required to act as if he were infallible, nor can he be held liable because his honestly formed opinion on a question of law proves to be wrong. He is, however, bound to exercise care in the

> performance of his services and his negligence therein renders him liable to his clients for damages caused thereby: see *Nocton v. Lord Ashburton,* [1974] A.C. 932 (H.L.). In *Brenner et al v. Gregory et al* [1973] 1 O.R. 252, 30 D.L.R. (3d) 672, my brother Grant put the matter succinctly this way [at p. 257 O.R., p. 677 D.L.R.]:
>
> > In an action against the solicitor for negligence it is not enough to say that he has made an error of judgment or shown ignorance of some particular part of the law, but he will be liable in damages if his error or ignorance was such that an ordinarily competent solicitor would not have made or shown it: *Aaroe and Aaroe v. Seymour et al,* [1956] O.R. 736, 6 D.L.R. (2d) 100, [1956-60] I.L.R.

Much the same conclusion was expressed by Justice LeDain of the Supreme Court of Canada in *Central Trust Company v. Rafuse and Cordon* (1986), 75 N.S.R. (2d) 109, at p. 141:

> A solicitor is required to bring reasonable care, skill and knowledge to performance of the professional service which he has undertaken. See *Hett v. Pun Pong* (1890) 18, S.C.R. 290, at p. 292. The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor. See Mahoney, *Lawyers -- Negligence -- Standard of Care* (1985, 63 Can.Bar.Rev. 221.

In the case before me regarding Piggott, it does not matter whether liability arises in contract or in tort; the result is the same. The contract between Keirstead and Piggott

required that he was to be satisfied there was a registered access to the property. As a result of an error or a series of errors, Piggott failed to discharge that obligation.

It is clear that liability may be incurred in tort and in contract concurrently. LeDain, J. said in *Central Trust* (at pp. 139-140):

> What is undertaken by the contract will indicate the nature of the relationship that gives rise to the common law duty of care, but the nature and scope of the duty of care that is asserted as the foundation of the tortious liability must not depend on specific obligations or duties created by the express terms of the contract. It is in that sense that the common law duty of care must be independent of the contract. The distinction, in so far as the terms of the contract are concerned, is, broadly speaking, between what is to be done and how it is to be done. A claim cannot be said to be in tort if it depends for the nature and scope of the asserted duty of care on the manner in which an obligation or duty has been expressly and specifically defined by a contract. Where the common law duty of care is co-extensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from contractual intention which should preclude reliance on a concurrent or alternative liability in tort. the same is also true of reliance on a common law duty of care that falls short of a specific obligation or duty imposed by the express terms of a contract.

Keirstead's claim against Piggott arises both in contract and in tort and for the various reasons I have set forth, I find Piggott liable to Keirstead for the damages occasioned by his negligence.

b) Innocentes' Liability

(i) Warranty Deed

In reaching my conclusion with respect to the liability of Mr. and Mrs. Innocente, I have considered especially the meaning and intent expressed and implied by the use of a warranty deed. By virtue of section 15(2) of the *Conveyancing Act*, a warranty deed covenants for a quiet enjoyment, good title, right to convey, freedom from encumbrances and further assurances as set out in that *Act*, which subsection reads:

> (2) Except where it otherwise appears from the agreement, where any agreement to convey requires the conveyance to be by a 'warranty deed', a conveyance containing the covenants for quiet enjoyment, good title, right to convey, freedom from encumbrances and further assurances, as set out in Column One of Schedule B to the Part shall be sufficient compliance with the agreement. R.S., c.56, s.7.

The relevant paragraphs of Column One, used verbatim in the warranty deed to Keirstead, are clearly those of a warranty deed and effectively warrant the title as set forth in that Column.

Keirstead was deprived of the quiet enjoyment of his lands as described in the deed, including the right-of-way. The grantors did not have title to a right-of-way and did not have the right to convey one. The covenant of the deed was breached and the grantors are liable for the resulting damages.

(ii) Misrepresentation

While it may be unnecessary, I think it advisable to express my concern about the results of the assurance given by Mr. and Mrs. Innocente to Keirstead that a right-of-way existed.

I find as a fact that Mr. Innocente represented to Keirstead that a right-of-way existed from the land to the public highway. I also find that Mr. and Mrs. Innocente knew or ought to have known that there was a very significant question about the validity of right which they did not disclose. That failure to disclose amounted to a misrepresentation and which brings to the fore implications which must be addressed within the meaning of *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1964] A.C. 465. Justice Cromwell of the Appeal Court of Nova Scotia recently referred to that case in *Barrett v. Reynolds* 164 N.S.R. (2d) 256 and the Supreme Court of Canada decision in *Queen v. Cognos*, [1993] 1 S.C.R. 87, wherein Iacobucci, J. set forth (at p. 110) the mandatory elements for such a claim as follows:

> The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometime in varying forms. The decisions of this Court cited above suggest five general requirements: (1) there must be a duty of care based on a 'special relationship' between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

> (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

I will address each of these elements in the context of the facts before me.

1. I conclude there was a "special relationship" between Mr. Innocente and Keirstead - as Iacobucci, J. discussed it in *Queen v. Cognos*, (at p. 116):

> There is some debate in academic circles, fuelled by various judicial pronouncements, about the proper test that should be applied to determine when a 'special relationship' exists between the representor and the representee which will give rise to a duty of care. Some have suggested that 'foreseeable and reasonable reliance' on the representations is the key element to the analysis, while others speak of 'voluntary assumption of responsibility' on the part of the representor. Recently, in *Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568 (H.L.), a case unlike the present one in that there the whole issue revolved around the existence of a duty of care: foresee ability of damage, proximity of relationship, and the reasonableness or otherwise of imposing a duty.

On any of these approaches it is clear to me that a special relationship existed between Mr. Innocente and Keirstead.

2. As is also clear, the representation that the right-of-way existed was at the very least inaccurate or misleading and, as I find, untrue. In making the representation, Mr. Innocente did not measure up to the standard of care required in the circumstances. Iacobucci, J. referred to the standard in *Queen v. Cognos* (at p. 121) as follows:

> The applicable standard of care should be the one used in every negligence case, namely the universally accepted, albeit hypothetical, 'reasonable person'. the standard of care required by a person making representations is an objective one. It is a duty to exercise such reasonable care as the circumstances require to ensure that representations made are accurate and not misleading: see *Hedley Byrne, supra*, at p. 486, *per* Lord Reid; *Hodgins v. Hydro-Electric Commission, supra,* at pp. 506-9, *per* Ritchie J. for the majority of this Court; *H.B. Nickerson & Sons v. Wooldridge, supra*, at pp. 135-36; J.G. Fleming, *The Law of Torts* (7th ed. 1987), at pp. 96-104 and 614; Linden, *supra*, at pp. 105-19; and Klar, *Supra*, at pp. 159-60.

3. Mr. and Mrs. Innocente both knew of the right-of-way problem and both were aware of their efforts to rectify it. They knew the Flemming title had been quieted and did not mention it. They failed to divulge that information. As Iacobucci, J. said in *Queen v. Cognos* (at p. 123), "... failure to divulge highly relevant information is a pertinent consideration in determining whether a negligent misrepresentation was made".

4. Keirstead's reliance on the representation, while limited, did set into motion the chain of events leading to his eventual loss. He relied on the representation to the extent that he paid $100.00 for the agreement of purchase and sale. He said he was wary of the assurance of the right of access because of the manner in which it was given and that was why he was so explicit in his instruction to Piggott. When that instruction was given his reliance on the representation shifted from Mr. and Mrs. Innocente to Piggott.

5. There is no doubt that the initial misrepresentation, even though it ought to have been caught by Piggott, was carried through to the covenant in the warranty deed and eventually resulted in damage to Keirstead.

(iii) Unjust Enrichment

The principle of unjust enrichment has been stated in many contexts within Canadian law, but the basic requirements for the imposition of it have remained constant. In Nova Scotia, for example, Hallett, J., referred to it in *MacInnis v. MacMillan* (1989), 94 N.S.R. (2d) 271, when he said:

> For a plaintiff to prove an unjust enrichment, the plaintiff must meet three requirements:
>
> (a) an enrichment
> (b) a corresponding deprivation;
> (c) the absence of any juristic reason for the enrichment.

While the principle of unjust enrichment (and resulting trust) has most frequently been applied in family law cases, its use is found in other fields as well; for example, Gautreau, J. of the General Division of the Ontario Court said in *Magical Waters Fountains Ltd. v. Sarnia* (1990), 74 O.R. (2d) 682:

> The law of restitution is an independent body of law which exists in its own right. It is based on the principle of unjust enrichment, which is designed to meet situations of obvious injustice wherever they occur. In the classic case, unjust enrichment involves an enrichment of the defendant at the expense of the plaintiff, in circumstances which offend a reasonable person's sense of justice and equity. Being a law of general application, it is not excluded from particular

> fields of activity or particular categories of relationship. It transcends such enclosures, and this includes municipal law.
>
> It applies independently of the law of contract. In point of fact, its doctrine has been developed, in large part, to cover precisely the situation where there is no contract.

On the facts as I have found them:

1. Mr. and Mrs. Innocente were enriched by the use of the $50,000 cash received at the time of the sale and by the interest paid on the mortgage to the time Keirstead received the right-of-way for which he bargained - the first day of trial.

2. Keirstead was deprived of the use of his property and the use of his money.

3. There was no juristic reason for the Innocentes' enrichment.

Mr. and Mrs. Innocente purportedly conveyed to Keirstead a right which they did not have. They are, therefore, liable to Keirstead for the damage occasioned by that lack of title.

Damages

I will examine each item of damages claimed by Keirstead.

1. Diminution in property value. As Keirstead now has the right-of-way for which he bargained it has been agreed that this claim has been satisfied.

2. Interest on down payment. The Innocentes have had the use of $50,000.00 since it was paid to them on August 17, 1992, while Keirstead was effectively denied the use of the property. Keirstead is entitled to interest on that amount for that period. The mortgage to the Innocentes calls for interest at 8% per annum and I conclude that is a reasonable rate of return. I calculate that interest (with compounding) to total approximately $33,000.00. I allow the compounding as the parties agreed that the interest on the mortgage is a reasonable measure of return on investment.

3. Interest on mortgage payments. Keirstead is entitled to the return of the interest portion of his mortgage payments made to the Innocentes which amounts to $56,000. As recent payments have been made to the plaintiff's solicitor and held in trust in an interest bearing account, I leave it to counsel to work out the precise amount to be paid to Keirstead, but I do note that the amount of interest gained while held in trust should be paid to Keirstead, but credited equally to Piggott and the Innocentes.

4. Keirstead paid municipal taxes on the properties since he bought it in the approximate amount of $7,000.00, which figure does not include 1999 taxes. He is entitled to the return of that amount.

5. Keirstead claims that he has made approximately six trips per year from Prince Edward Island to deal with problems with the property. The evidence concerning this amount was somewhat unsatisfactory in that the precise costs were not established, nor was the necessity for the trips. I will therefore not allow a specific figure for this item, but I am satisfied there was a loss in this regard. I will mention it below.

6. Keirstead claims $200.00 for telephone expenses, but the specific loss for this item has not been proved. I am satisfied there was a loss in this regard. I will mention it below.

7. When Keirstead bought the property in 1992 he had fill and backhoe work done on the property. While most of the value of that work remains on the property, because it was abandoned it will require $810.00 plus taxes to restore it to its 1992 state. He is entitled to that sum of money, or $930.00.

8. Keirstead brought his backhoe to the site from Prince Edward Island to work on the property. He discontinued working on the property. Because of the expense of moving it he left it on the site. He said it was a $10,000.00 machine and therefore, he lost the value of its use for that period of time. He reasoned that the cost of moving the machine made it uneconomical to have it moved back to Prince Edward Island. If he could have foreseen the length of time it was going to require to bring a conclusion to this matter it would have been wise to have moved the machine back to PEI, but then, hindsight is so easy. This

claim may be part of the disruption suffered by Keirstead but I decline to award damages for it.

9. Keirstead brought lumber he had milled himself onto the property in 1992. When he could not build his house he sold some of that lumber at a loss which loss had been caused because it had weathered while on the property. The unsold rest of the lumber also depreciated. I am satisfied that Keirstead's loss on the lumber amounted to $1,521.00.

10. Keirstead paid $36.00 for building permits which have expired and he is entitled to the return of that amount.

11. Keirstead claimed the loss of economic opportunity arising, as I understand it, from his inability to invest funds which he could have obtained from the subdivision of the property - at least into two lots - and accordingly recover some of his investment. I am persuaded that Keirstead did lose the opportunity to subdivide, but I am uncertain of the net value of that opportunity. I do not have enough evidence before me to reach a decision either on the value of any lot which might have been sold or the cost of bringing about such a sale. I therefore do not award a specific figure for this item but will include a consideration of it in the general damages award.

I also refer to Waddam's, *The Law of Damages*, (loose-leaf addition) p. 1-1, where the author says:

> Consequently, compensation (for loss of property) may be usefully regarded as containing two elements: a substitute for loss of the value of the property and a substitute for the loss of the opportunities to use it.

12. Keirstead incurred legal fees paid in the amount of $650.00 to Piggott. That amount must be repaid to him.

13. General damages. In arriving at a figure suitable for general damage I keep in mind various items of damages mentioned above where quantification is difficult. But mere difficulty in assessing a precise figure for damages should not prevent recovery. These items are:

- travel to and from Prince Edward Island;
- telephone expenses;
- the disruption caused by having left his backhoe on the property;
- loss of economic opportunity due to being unable to proceed with a subdivision;
- loss of opportunity by reason of having to encroach upon his capital assets to service the mortgage.

14. Keirstead is 61 years old. It is perhaps fortunate that he is single as I am sure that if he had had the responsibility of a family the results of this misadventure would have been more devastating than they were.

Keirstead is by no means a wealthy man. He has an investment income derived from rolling his teacher's pension into investments plus his Canada Pension Plan. When he found the land in question he intended to subdivide it in accordance with applicable regulations and use the resulting revenue to fund his plans. When he could not get proper access to the property he had to put all his plans on hold. He had already done a considerable amount of physical work in the preparation of the property for his home but fortunately, most of that work led to a permanent improvement in the property. He was, however, forced to return to his cottage on the north shore of Prince Edward Island and attempt to make that cottage habitable for most of the year.

Since he purchased the property and mortgaged it he has had to make the mortgage payments. His regular income was not sufficient for his usual living expenses plus the cost of servicing the mortgage and accordingly was forced to cash some of his savings and investments. With this reduction of capital he suffered a loss of income. It is very difficult to quantify that loss, as I have noted above.

When Keirstead started work on the property he moved a travel trailer with a stove onto it so that he could stay there while he worked. After he discontinued his work the stove was stolen and the trailer was vandalized and destroyed. This loss is perhaps not

attributable to the cause of this action but is an indication of the disruption Keirstead experienced.

Keirstead did not attempt to establish another permanent home during the period in question. Rather, he stayed on Prince Edward Island at his summer cottage until around December of each year and then, as the weather became too cold, drove to Florida where he has a small sailboat on which he lived for the cold months of the winter. That boat did not even have cooking facilities.

He said he found the past seven years very difficult. He felt anger and depression because of the situation in which he found himself. He had done some writing but because of his situation lost interest in that activity. On Prince Edward Island he spent most of his time on organic farming, but nonetheless feels that he has lost a period of his life. He described it as, "in some ways, a seven year waste".

Undoubtedly Keirstead suffered great inconvenience, discomfort and disruption. His anger and frustration are entirely understandable. Instead of constructing his retirement home he was forced to retrench financially and, in effect, put his retirement plans on hold until this matter could be straightened out. His quality of life was diminished considerably and was forced to live in the most basic of accommodation.

McGregor on Damages (16th Ed.) at paragraph 94 refers to a case with a number of similarities as follows:

> In *Bailey v. Bullock* [1950] 2 All E.R. 1167 the plaintiff instructed the defendant solicitor to press urgently for possession of a house, which the plaintiff had left to a third party. The defendant's clerk, who knew that the plaintiff, with his wife and child, had no other living accommodation, failed to start proceedings, but deceived the plaintiff for nearly two years into believing that he had. On discovering the deception, the plaintiff instructed other solicitors and obtained possession of the house, but during all this time he, with his wife and child, had lived in discomfort in a small house with his wife's parents. He recovered, *inter alia*, damages for this inconvenience and discomfort, the court holding that the two earlier cases clearly established this head of damage in a proper case.

In my view, this is a proper case.

The late Chief Justice Cowan awarded general damages in the case of *Caldwell and Caldwell v. Fitzgerald* (1977), 26 N.S.R. 140, a solicitor's negligence case. While the case report does not give much detail concerning the plaintiff's experience, Chief Justice Cowan awarded $3,000.00 general damages "for inconvenience and discomfort and disruption caused by the negligence of the defendants".

Plaintiff's counsel has submitted that by adjusting the general damages awarded in this case to reflect inflation and to correlate the apparent length of time of the disruption of the plaintiff, an award of $50,000.00 general damages would be appropriate. I do not

know the details of the "inconvenience, discomfort and disruption" experienced by *Caldwell* but I do know some of the details of Keirstead's experience. They were very considerable and I accept as entirely factual his description of them as given to me in his testimony.

But in addition to the obvious criteria to be considered under this head of damage I have deferred awarding specific sums for extra travel, telephone expenses and losses of economic opportunity arising from his inability to subdivide the property and the consequent necessity to encroach upon his capital to service the mortgage.

In all the circumstances of this case including those which I have mentioned above, I award Keirstead the sum of $60,000, general damages. It will be noted this figure exceeds the amount requested by the plaintiff under this head, but it includes those items mentioned above which are technically items of special damages, but which I found difficult to quantify.

Summary

To summarize, I have awarded Keirstead the following:

Interest on down payment	$33,000.00
Interest on mortgage payments	56,000.00
Municipal taxes	7,000.00
Backhoe work	930.00
Loss on lumber	1,521.00
Building permits	36.00
Legal fees	650.00
General damages	60,000.00
Total	**$159,137.00**

Apportionment and Contribution

I have concluded that as between Piggott and the Innocentes their liability is joint and several. I refer to *Nowlan et al v. Brunswick Construction Ltee.*, [1972] 34 D.L.R. (3d) 422, where Limerick, J.A. of the New Brunswick Court of Appeal addressed the matter of joint and several liability as follows:

> Where there are concurrent torts, concurrent breaches of contract or a breach of contract and a concurrent tort both contributing to the same damage, whether or not the damage would have occurred in the absence of either cause, the liability is a joint and several liability and either party causing or contributing to the damage is liable for the whole damage to the person aggrieved: see *Thompson v. London County Council*, [1899] 1 Q.B. 840 (C.A.), and see Glanville Williams on *Joint Torts and Contributory Negligence* (1951), p. 2.

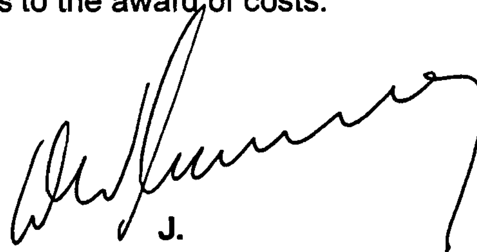
On appeal of the Supreme Court of Canada, [1974] 49 D.L.R. (3d) 92, this conclusion was not disturbed. I have also referred to the decision of Nobel, J. in *Kormaniski v. Marien et al* (1979), 100 D.L.R. (3d) 81, where he reached much the same conclusion with respect to contribution, even though the parties in that case were somewhat different from this case.

As to contribution between Piggott and the Innocentes, however, I conclude Mr. and Mrs. Innocente should contribute to the extent of one-half of the interest on the down payment, the interest on the mortgage and the municipal taxes, or $79,500.00. Piggott

should contribute the balance, or $79,637.00. I reach this conclusion as to require Piggott to contribute to the interest factor of mortgage payment would be an enrichment to the Innocentes. It is entirely coincidental that these sums are nearly equal.

Costs

If necessary, I will hear the parties as to the award of costs.



J.