SOLICITORS' NEGLIGENCE: AN ESSAY ON THE *MOORCROFT* DECISION

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The decision in Moorcroft *v.* Doraty & Kebe *appears to establish several specific duties for a solicitor retained after an offer to purchase real property is made and accepted. These include: (1) ensuring that his or her clients understand the initial agreement; (2) conducting a full and accurate search of title; (3) disclosing, in full, the state of the title prior to closing, and (4) advising on how to abort a binding contract with the vendor's consent or to breach it without such consent.*

However, the writer's view is that the decision in Moorcroft *doesn't accord with the approach taken by the Ontario Court of Appeal in its 1986 decision,* Blinkhorn *v.* Ainsworth; Hodgson Third Party. *In that case, the Court carefully examined all relevant provisions of an Agreement of Purchase and Sale in order to determine responsibility and liability. What is implicit in* Blinkhorn *is that a purchaser's solicitor will be absolved of negligence if he or she does not search for rights of way under an agreement excluding these from good title.*

Applying this precedent to the facts in Moorcroft, *the writer reaches a different result than that of the High Court. Although the property purchased by the Moorcrofts was subject to a right of way, by virtue of the agreement between the vendor and the purchasers, the Moorcrofts were precluded from rescinding the contract. The couple's solicitor was not*

La décision rendue dans l'affaire Moorcroft *c.* Doraty & Kebe *semble établir plusieurs devoirs spécifiques que doit accomplir un avocat ou une avocate qui a reçu son mandat après la présentation et l'acceptation d'une offre d'achat d'un bien immeuble. Il doit: 1) s'assurer que ses clients ou clientes comprennent le contenu de l'entente initiale; 2) faire une recherche de titres complète et exacte; 3) divulguer intégralement l'état du titre avant la conclusion de l'entente; 4) donner des conseils sur la façon de faire annuler un contrat exécutoire avec le consentement du vendeur ou de la venderesse, ou sur la façon de le rompre sans son consentement.*

Toutefois, l'auteur est d'avis que la décision dans Moorcroft *contraste avec l'approche adoptée par la Cour d'appel de l'Ontario dans la décision de 1986,* Blinkhorn *c.* Ainsworth; Hodgson Third Party. *Dans cet arrêt, la cour a examiné avec soin toutes les clauses pertinentes de la promesse d'achat-vente afin de déterminer la responsabilité des parties. Il est implicite dans* Blinkhorn *que l'avocat ou l'avocate d'un vendeur ne sera pas jugé négligent s'il ou elle ne vérifie pas l'existence d'un droit de passage lorsque la promesse d'achat prévoit que le titre est valide malgré l'existence d'une telle servitude.*

En appliquant cette approche à l'affaire Moorcroft, *l'auteur en arrive à une conclusion différente de la Haute Cour. Bien que la propriété achetée*

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responsible for restrictions registered on title and exceptions contained in the agreement, and would accordingly not be held liable.

The Moorcroft *decision, therefore, appears as yet another attempt to impose strict liability on the solicitor; that is, to require the solicitor to warrant or guarantee all his or her work and this, possibly, even in the face of disclaimers or qualifiers as to the professional advice and services to be rendered. In the end, however, this approach may not create a better lawyer or a better served public.*

par les Moorcroft ait été grevée d'un droit de passage, ils ne pouvaient, en vertu de l'entente qu'ils avaient conclue avec le vendeur, faire résilier le contrat. L'avocat des Moorcroft n'était pas responsable des restrictions qui grevaient le titre tel que décrit par l'entente, et n'en serait par conséquent pas tenu responsable.

Par conséquent, dans l'affaire Moorcroft *on semble encore essayer d'imposer à l'avocate ou l'avocat une responsabilité stricte en exigeant qu'il garantisse tout son travail, et ce, peut-être même en dépit du fait que le contrat portant sur les conseils professionnels et la prestation des services de l'avocat ou de l'avocate renferme une clause de non-responsabilité ou toute autre clause limitant la responsabilité. En définitive, il se peut que cette approche n'ait pas pour effet de rendre les avocates ou avocats meilleurs, ni de mieux servir le public.*

I. INTRODUCTION

Apart from evidencing some curious judicial conclusions, the decision of Mr Justice Smith in *Moorcroft* v. *Doraty & Kebe*,[1] in the face of contrary higher authority, attempts to break new ground as to the approach to be taken in determining solicitor negligence and makes the already harried real estate practitioner more vulnerable. If the *Moorcroft* decision is to prevail, then it will have a significant impact on the approach and manner in which lawyers in other areas and specialties practice law.

The facts in *Moorcroft* are relatively easy to enunciate and comprehend. The Moorcrofts set out to make their first purchase of land in Canada and examined property in the Ottawa capital region to fulfil that goal. They made various offers through a licensed real estate brokerage but, before signing any of these offers, consulted their own solicitor. It appears, however, that the solicitor did not charge a fee and that the Moorcrofts did not pay for these consultation interviews.

Although the offers to purchase were on a regular form approved by the Ontario Real Estate Board, they were turned down by various vendors because of changes in the wording of the form initiated by the Moorcrofts. Eventually, the Moorcrofts signed an Agreement of Purchase and Sale for the purchase of an end freehold unit (one of six common-wall townhouses) in the City of Nepean. This offer was accepted.

Having been forewarned by their solicitor that he would start to charge them legal fees for time-consuming consultations concerning the contents of their offers,[2] the Moorcrofts did not meet with or consult their lawyer prior to making their offer to purchase the end unit.[3] They did, however, retain the same lawyer, Mr Kebe, to close the transaction.

All offers made by the Moorcrofts, including the one accepted, were on standard Ontario Real Estate Board forms and contained the following "exception clause"[4]:

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[1] (1990), 71 O.R. (2d) 470, 65 D.L.R. (4th) 315 (H.C.) [hereinafter *Moorcroft* cited to O.R.].

[2] *Ibid.* at 472.

[3] *Ibid.*

[4] Exception clauses, variously worded, commonly appear in standard form Agreements of Purchase and Sale. In addition to the one in the Ontario Real Estate Board form, *see, e.g.*, the standard form of the Toronto Real Estate Board or the form of the Real Estate Board of Ottawa-Carleton. Such clauses are also common outside of Ontario. *See, e.g., Re Mallot and Mosher* (1964), 44 D.L.R. (2d) 191 (N.S.S.C.).

> Provided the title is good and free from all encumbrances,[5] *except* as aforesaid, and except as to any registered right of way or other registered easements, registered restrictions[6] or covenants that run with the land,[7] provided such are complied with, the Purchaser is not to call for production of any title deed, abstract or other evidence of title except such as are in possession of the Vendor.[8] [emphasis added]

In fact, the property purchased by the Moorcrofts was subject to "an easement of way" set out in an agreement between the original developer and the municipality and registered on title.

This "easement of way", repeatedly referred to by Smith J. as a "right of way", enables the owners of the inside units to have access to their backyards at all times, and particularly, for any purpose that would

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[5] In the case of *Clark* v. *Raynor* (1922), 65 D.L.R. 425 at 439-40 (N.S.C.A.), Rogers J., speaking for the Court, said: "The word "encumbrance" has no technical meaning. It is not one of the "terms of the law and no definition of it will be found in the older books....". In *Re Malott and Mosher, supra*, at 193, Bissett, J. writes: "I am of the opinion, therefore, that "encumbrances" in this agreement means "*burdens*" in the nature of mortgages or registered judgments or liens....". *See also In re Ellenborough Park, Re Davies, Powell* v. *Maddison*, [1956] CH. 131, [1955] 3 ALL E.R. 667 (C.A.).

[6] In *Blinkhorn* v. *Ainsworth; Hodgson, Third Party* (1986), 54 O.R. (2d) 182 at 184, 26 D.L.R. (4th) 318 at 320 (C.A.) [hereinafter *Blinkhorn* cited to O.R.], Grange J.A., considering a clause similar to the one in *Moorcroft*, adopted the views of D.H.L. Lamont, Q.C., in his work *Real Estate Conveyancing* (Toronto: Law Society of Upper Canada, 1973) at 42 to the effect that the word "restrictions" does not encompass "easements". Grange J.A. commented further: "The clause is a very onerous one for the purchaser and is often struck out by his solicitor if given an opportunity before the agreement is signed." *See also Zygocki* v. *Hillwood* (1975), 12 O.R. (2d) 103 at 110, 68 D.L.R. (3d) 55 at 62 (H.C.) for an example where the deletion was made.

[7] In *Blinkhorn, supra*, at 184, Grange J.A. writes: "There is apparently no case in our jurisdiction interpreting the meaning of "registered restrictions or covenants that run with the land...."". At first instance, the trial judge in *Blinkhorn* dismissed the third-party action upon the sole ground that a right of way came within the meaning of such phrase and that, accordingly, the purchaser could not resile from the contract because of the inclusion of this phrase in the Agreement of Purchase and Sale.

[8] In the Ontario Real Estate Board form, as is the case with many other standard forms, such an exception clause appears following a blank space in which further provisions may be typed-in or inserted. This space is now commonly used to add conditions and various other terms particular to the property or parties in question. It is the writer's view, however, that the original and primary purpose for the space was to insert particulars of any mortgage or other encumbrance which the purchaser was agreeing to assume. With the insertion of such a clause in the space on the form, one can more readily appreciate the intent and construction of the phrase that follows: "provided title is good and free from all encumbrances, *except as aforesaid*". (emphasis added)

not lend itself to convenient access from or through the actual premises.[9] In unrelated litigation, this right was found to have been validly created and to be properly enforceable by the dominant tenements.[10]

Upon completing the search of title, the Moorcrofts' lawyer discovered the right of way, but apparently did not bring it to the attention of the purchasers, either during the meeting before closing arranged to sign documents, or in the reporting letter following closing.

In his judgment, Smith J. refers to an admission made by Kebe during trial that he neither made reference to the exception clause appearing in the standard form offer, nor did he discuss any other specific printed clauses in the standard form agreement.[11] This appears to be a crucial, though curious, finding that ultimately led to the decision against the solicitor. It is curious because, although there was an apparent admission by Kebe in that regard, there was also judicial recognition given to evidence pointing in another direction.

The Court found that the Moorcrofts insisted on making many changes in the regular Ontario Real Estate Board form during the initial set of offers. Each time, before being signed, the initial offers were taken to Kebe for his advice. On one specific occasion, the Court notes that the Moorcrofts insisted on extending the time allowed for the search of title.[12]

It seems inconceivable that the Moorcrofts would be so "careful" and "meticulous"[13] on such a relatively sophisticated point, and yet, at the same time, not be aware that they were agreeing to accept ownership and title subject to "any registered right of way or other registered easements, registered restrictions or covenants that run with the land".[14]

It appears, however, that in deciding the issue of solicitor negligence, Mr Justice Smith was not prepared to attach any importance or

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[9] In the words of Smith J.: "One obvious purpose of the right of way is to enable the owners of the inside units to gain access to their backyard when laden with bulky tools or machinery or for any purpose that does not conveniently lend itself to access from the premises": *Moorcroft, supra*, note 1 at 471-72. The registered easement contained these words: "....for the benefit of the lands more particularly described in Schedule "B", from time to time and at all times hereafter at its and their will and pleasure by day and by night and for all purposes for persons, animals and vehicles *along and over* the lands described in Schedule "A"": *ibid.* at 471 (emphasis added). While at first blush an expression like "along and over" seems to make the right of way overwhelmingly broad, it is submitted that such a phrase with the conjunctive word "and" helps to limit the right. For example, it might reasonably be argued that having picnic or recreational equipment permanently stationed or positioned on the right of way would not be captured by the words and would, therefore, not be permissible.

[10] *Cohen* v. *Boone* (1921), 64 D.L.R. 429, 50 O.L.R. 368 (H.C.) and *Riis* v. *Wallman* (1987), 47 R.P.R. 87 (Ont. Dist. Ct) for a general review of the concepts of dominant and servient tenements and easements.

[11] *Moorcroft, supra*, note 1 at 473.

[12] *Ibid.* at 472.

[13] Words used by Smith J. in referring to the actions of the Moorcrofts, *ibid.*

[14] Words in the standard form Agreement of Purchase and Sale signed by the Moorcrofts.

significance to whether the Moorcrofts were aware of such standard clauses in the offers they chose to make, or whether, in the circumstances, their solicitor could reasonably assume that his clients knew of such clauses or that they recognized that by virtue of the kind of premises they were purchasing (the end unit of a six-unit row) such exceptions were absolutely necessary and inevitable.[15]

Indeed, Smith J. would impose more absolute requirements on the solicitor. More precisely, a solicitor retained after an offer to purchase real property is made and accepted, has several specific duties. These include:

1. ensuring that his or her clients understand the contents of the initial agreement;
2. conducting a full and accurate search of title;[16]
3. disclosing, in full, the state of the title prior to closing;
4. advising on the right to abort a binding contract with the vendor's consent or to breach it without such consent.[17]

II. Duty Concerning the Contents of the Agreement

With reference to the first specific duty, it is not totally clear from Mr Justice Smith's judgment whether this applies both to situations where the solicitor is consulted before the offer is made and accepted, and also in those situations where, without prior consultation as to the contents of the contract, the accepted agreement is brought to the solicitor to do the required legal work to close the transaction. At one place in his judgment, Smith J. writes:

> A purchaser [has] a right to expect that a solicitor whom he consulted would apprise him of the potentially adverse effect that the pertinent printed words in the agreement could have if he were advising *prior* to the initial contract being signed, and if the retainer *followed* the formation of the contract, would acquaint him fully with the state of the title prior to closing.[18] [emphasis added]

With that paragraph it can be reasonably argued that the Court set different duties for the real estate lawyer depending on the circumstances or time of the retainer. Yet, earlier in the judgment, upon finding the Moorcrofts' solicitor negligent on the facts, Smith J. makes a more bald assertion:

> [A] solicitor acting for the purchaser in a real estate transaction must ensure that his clients understand the contents of the initial agreement....[19]

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[15] In the words of Smith J.: "The plaintiffs....[should not] be fixed with knowledge by reason of their premises being an end unit": *Moorcroft, supra*, note 1 at 471.

[16] *Ibid.* at 473.

[17] *Ibid.* at 474.

[18] *Ibid.*

[19] *Ibid.* at 473.

While the possible distinction noted earlier would normally seem significant for the purpose of limiting a solicitor's negligence when retained after the Agreement of Purchase and Sale is signed, in practical terms, it seems virtually impossible for the solicitor to truly escape explaining the initial agreement in light of the other duties set out by Mr Justice Smith.

III. The Second and Third Specific Duties in *Moorcroft*

With reference to the second requirement or duty of the purchaser's solicitor concerning a full and accurate search of title, even in its broad, unqualified form, it remains trite law and it seems unnecessary to make any comment on it. But surely the third requirement is in need of some restriction or qualification. It is inconceivable that a lawyer should be required to discuss with his client every single aspect of a 40-year search of title.

At one place in his judgment, Mr Justice Smith states that it is the solicitor's duty to acquaint his client fully with the state of the title.[20] At another place, however, he notes that a lawyer must at least make full disclosure of "all *relevant* information yielded by the search".[21] Although clearly making *obiter* statements, it appears that Smith J. might concede that there would be no breach of such duty if a solicitor merely failed to inform his client about: (1) a zoning bylaw; or (2) some minor easement to public utilities; or (3) some circumstance that might have a deleterious effect on a purchaser's intended use of the property.[22] You would think that this list would include matters that the purchaser had expressly agreed by written contract to accept without question; that is, matters which "the purchaser....could not have resiled from the contract because of....".[23] Mr Justice Smith chose, however, to reason his decision in a different way. Almost half-heartedly, Smith J. found the right of way to be an encumbrance. In his own words. the "right of way encumbered the title".[24]

It will be recalled that the Agreement of Purchase and Sale before him required the title to the property to be "good and free of all encumbrances".[25] It appears, therefore, that if a right of way were seen as an "encumbrance", the vendor would not be absolved from removing such right before closing and the purchaser's lawyer could be found negligent if he failed to guard or ensure the purchaser's right to such removal. Assuming, for the moment, that Mr Justice Smith were committed to this reasoning, in the instant case, it could not prevail for at least two reasons.

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[20] *Ibid.* at 474.

[21] *Ibid.* at 473 (emphasis added).

[22] *Ibid.* at 474.

[23] Words used by Grange J.A. in *Blinkhorn*, *supra*, note 6 at 184 when considering a similar matter.

[24] *Moorcroft*, *supra*, note 1 at 473.

[25] Words in the standard form Agreement of Purchase and Sale signed by the Moorcrofts.

First, British and Canadian jurisprudence alike make it clear that the word "encumbrance" has no technical meaning[26] and must, therefore, be interpreted according to the context in which it is found.[27] What Mr Justice Bissett stated in *Re Malott and Mosher*[28] is elucidating and applicable to the situation in *Moorcroft*:

> The context then in which "encumbrances" appears in the present agreement is with "mortgages" because they are the encumbrances "aforesaid". I am of the opinion, therefore, that "encumbrances" in this agreement then means "*burdens*" in the nature of mortgages or registered judgments or liens and *not* easements which I think the clause in the deed providing for entry and a right of way....really creates.[29] [second emphasis added]

But even if such authorities were wanting or not convincing, in the specific agreement before Mr Justice Smith, the finding that a "right of way" was an "encumbrance" could not possibly assist.

While the words in the Agreement require the vendor to provide title that is "good and free from all encumbrances", one of the specific exceptions in the same clause is "any registered right of way". Here again are the relevant words in the Ontario Real Estate Board form:

> Provided the title is good and free from all encumbrances, except as aforesaid, and *except* as to any registered right-of-way....the purchaser is not to call for....evidence of title except....as are in the possession of the vendor. [emphasis added]

There must, therefore, have been some other compelling reason for raising the status of a right of way to that of an encumbrance and to distinguish it from a zoning bylaw or utility easement. At page 474 of his judgment, Mr Justice Smith may provide some insight:

> As the events which later unfolded conclusively prove, this [right of way] was a serious and highly significant registered right.[30]

Yet, we are also told in his judgment that the evidence had established that other purchasers, knowing about the right of way before closing, were not deterred from becoming owners. Further, there was also the uncontradicted evidence of the appraiser that the existence of the right of way had absolutely no monetary impact, past or present, on the saleability of the property. Ultimately, the nominal damage award given by Mr Justice Smith was totally consistent with the findings of minimal effect or consequence.[31]

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[26] *See Clark* v. *Raynor*, *supra*, note 5 at 439-40 and *In re Repington Wodehouse* v. *Scobell*, [1904] 1 CH. 811.

[27] *Jackson* v. *Pearldale Limited and Fred L. Cox Limited* (1962), 47 M.P.R. 257 at 267.

[28] *Supra*, note 4.

[29] *Ibid.* at 193. *See also Clark* v. *Raynor*, *supra*, note 5 at 439-40.

[30] *Moorcroft*, *supra*, note 1.

[31] *Ibid.* at 475.

From the findings noted, it is difficult to appreciate the decision to make failure to call a client's attention to a registered right of way, a breach of the standard of care required of a solicitor. Perhaps the Moorcrofts' assertions that they would *not* have purchased the property had they known about the right of way tipped the scales against their lawyer. The Court, however, must surely have discounted those assertions as words emanating from hindsight. For example, if the right of way in the instant case was more troublesome than most, it was primarily, if not entirely, due to one of the owners in the six-unit row.

It was the Albertys who "by most accounts [were] difficult neighbours".[32] At the time of closing, however, the Moorcrofts could not possibly have known this or foreseen the supposed intolerable situation these neighbours could create. Indeed, even after closing, when the Moorcrofts purportedly first discovered the right of way passing over the rear of their property, they accepted the situation and "did their level best to settle the problem without unduly alienating the Albertys."[33] The approach taken by the Moorcrofts in the situation noted calls into question their assertion that they would have taken an absolutely negative stance at the outset and refused to close the transaction had they known about the right of way before closing.

More importantly, leaving aside for the moment the specific factual situation in *Moorcroft*, there is an even more fundamental query to be considered. Should a finding of solicitor's negligence be founded on a course of action that even a frivolous person asserts he would have taken but for the negligence? That is, if a client's decision to refuse to close a transaction once informed of the existence of a certain state of affairs were pivotal in determining a solicitor's negligence, would it not be reasonable to impose an objective test on such a refusal?[34] In other words, what would a reasonable, prudent purchaser do when informed just before closing of the existence of a right of way, which together with any other rights of way, he or she had agreed to accept by virtue of provisions in an Agreement of Purchase and Sale which he or she had voluntarily initiated?

As noted previously, there is no doubt that with reference to the six-unit freehold in Nepean, other unit owners had proceeded without hesitation to consummate their purchase transactions even when learning about the right of way prior to closing.[35] This, then, must surely provide us with some indication of the results if one were to properly apply an objective test.

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[32] *Ibid.* at 472.

[33] *Ibid.*

[34] *Reibl* v. *Hughes*, [1980] 2 S.C.R. 880, 114 D.L.R. (3d) 1. The Supreme Court of Canada examined the issue of "informed consent" in a medical context. It was decided that causation should be determined by an objective assessment of whether a reasonable person would have consented had he or she known *what the plaintiff knew at the time.*

[35] *Moorcroft, supra*, note 1 at 475.

Let us again focus specifically on the Moorcrofts and the scenario that might have reasonably transpired. If their lawyer had brought the right of way to their attention prior to the closing, is it not reasonable to assume that the Moorcrofts would also have learned of or been told about the actions of other purchasers before them? For the Moorcrofts to act differently from other purchasers and to refuse to close would most likely expose them to a lawsuit for specific performance or a claim in damages. They certainly could not rely on mere forfeiture of their deposit as the sole consequence of their refusal to close. It would seem that if the prospects of purchasing property subject to a right of way would sound "frightening" to any lay person, as Mr Justice Smith indicated,[36] then the prospects of forfeiture and being a defendant in ongoing litigation, without even the possibility of securing or achieving anything tangible, would certainly sound horrifying and would be seen by the Moorcrofts as something to be avoided at almost any cost.

Accordingly, whether applying a subjective or an objective test, it does not appear correct to suppose that the Moorcrofts would have refused to close the transaction had the specific right of way been brought to their attention before the closing date. All of that may be totally speculative and nothing more than second guessing the Moorcrofts, if not the trier of fact. Let us, therefore, turn our attention to something more substantive.

It is this writer's respectful view that the approach taken by Mr Justice Smith in *Moorcroft* to establish and find solicitor's negligence does not accord with the approach taken in a recent Ontario Court of Appeal decision. However, before discussing that appellate decision, a few additional references and comments about *Re Malott and Mosher*.[37] In that Nova Scotia Supreme Court decision, the purchasers sought to rescind the Agreement of Purchase and Sale because of a clause in the vendor's deed which gave a prior owner the right to enter the property to lay and maintain sewers. Mr Justice Bissett held that the purchaser was precluded from rescinding the written agreement by virtue of certain exceptions in the same contract.

On the face of it, the decision in *Re Malott and Mosher* has no relevance whatsoever when discussing issues of solicitor's negligence. Indeed, the case resulted from an application by the purchasers under the *Vendors and Purchasers Act*[38] of Nova Scotia. And, the case does not even contain *obiter* remarks on the issue of solicitor's negligence. Further, the Ontario Court of Appeal in *Blinkhorn*[39] expressly refused to follow that Nova Scotia decision. In fact, however, *Re Malott and Mosher* is significant to our discussions.

In determining whether the vendor was liable to the purchaser, the Nova Scotia Court looked solely to the contract between the disputing

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[36] *Ibid.* at 473.
[37] *Supra*, note 4.
[38] S.N.S. 1961, c. 12.
[39] *Supra*, note 6 at 184.

parties. Once it determined that the purchaser was precluded from rescinding the contract because of the exception clauses therein, the Court was then, without extraneous considerations, prepared to absolve others from liability.

In *Blinkhorn*, the Ontario Court of Appeal adopted the approach in *Re Malott and Mosher* for the purpose of determining responsibility and liability as between the parties to the contract and applied the same approach in considering and determining the question of solicitor's negligence. More precisely, in both cases, the Court set out first to determine whether or not the purchaser was precluded from rescinding the contract. If it answered this initial query in the affirmative, then the purchaser bore all consequences and no one else was liable, including the purchaser's solicitor.

In *Blinkhorn*, however, after inquiring into the contents of the contract, the Court concluded that the purchaser could have resiled from the contract.[40] It was the failure or inaction on the part of the purchaser's solicitor that denied the purchaser his right to rescind. In other words under the *Blinkhorn* approach, since the purchaser had not agreed to accept the property subject to a right of way, the purchaser's solicitor was liable because of his failure to make timely requisitions for the removal or voiding of such a right.[41]

It is submitted that the inquiry and finding concerning the purchasers' right to rescind should be prerequisite to determining solicitor's negligence whether the alleged negligence is failure to submit a timely requisition, or whether it is to inform the client about a matter the client has already agreed to accept by the terms of the contract he or she has signed.

It must be recalled and emphasized that the solicitor's negligence in *Moorcroft* was not founded on the solicitor's failure, during the gratuitous consultations,[42] to properly advise and inform his clients about

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[40] *Ibid.*

[41] *Ibid.* at 183. The relevant clause read as follows:

PROVIDED THAT the title to the property is good and free from all encumbrances except for any registered restrictions....[which] run with the land providing that such are complied with and except for any minor easements for the supply of domestic utility services to the property. If within the time allowed for examining the title any valid objection to title....is made in writing to the vendor and which the [v]endor is unable and unwilling to remove, remedy or satisfy and which [p]urchaser will not waive, this Agreement notwithstanding any intermediate acts or negotiations in respect of such objections, shall be at an end....

[42] At one point in the judgment, Mr Justice Smith writes:

Leaving aside the prior consultations, already mentioned, in respect of other properties in the same immediate area, all of which were subject to the same right of way, the plaintiffs ought to have been given the right to....abort the agreement....or to breach it.....: *Moorcroft*, *supra*, note 1 at 474.

At another place on the same page, he writes:

The failure here it must be emphasized, is to inform the client of a registered right of way. *Ibid.*

the exception and other clauses in the standard form agreement. The negligence was grounded, essentially, in the lawyer's failure to acquaint the client "with a state of the title" (which the client had agreed to accept subject to rights of way).

In a very real sense, the failures to be attributed to the solicitor in *Blinkhorn* were even more apparent than those in *Moorcroft*. In *Blinkhorn*, the solicitor had 30 days for examination of title and yet failed to submit a timely requisition with respect to a right of way. Moreover, it is probably fair to assume that upon discovering the right of way, he did not inform his client as to the state of the title or about the lateness of his requisition.

What is clear in *Blinkhorn* is that the solicitor would have been absolved of any negligence had the standard clause in the Agreement of Purchase and Sale excepted rights of way from good title.[43] However, the exceptions in the binding agreement were merely for "registered restrictions or covenants" and "any minor easements".[44] The relevant agreement before the Court in *Moorcroft* went significantly further than the agreement considered in *Blinkhorn* and specifically contained as an exception "any registered rights of way"[45] in addition to restrictions, covenants and easements.

Applying the approach in *Blinkhorn* to the facts in *Moorcroft*, we reach a different result from that reached by Mr Justice Smith. By virtue of and by express reference to the contract between themselves and the vendors, the Moorcrofts were precluded from rescinding the contract. The Moorcrofts' solicitor was not responsible for that state of affairs and, accordingly, could not be held responsible. We note again that in finding professional negligence and in setting out the duties for a solicitor (enumerated near the beginning of this essay), Mr Justice Smith 'left aside' the prior consultations the Moorcrofts had with their lawyer in respect of other properties in the same immediate area, all of which were subject to the same right of away.

Let us now turn to discuss:

> [T]he exact limit by which the skill and diligence which a solicitor undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that crassa negligentia....for which he is undoubtedly responsible.[46]

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[43] *Blinkhorn*, *supra*, note 6 at 183. The approach taken in *Blinkhorn* in determining solicitor's negligence is very much in keeping with the approach taken by the New Zealand Court of Appeal in *Bannerman Brydone Folster & Co.* v. *Murray* (1971), [1972] N.Z.L.R. 411 (C.A.), referred to by the Supreme Court of Canada in *Central Trust Co.* v. *Rafuse*, [1986] 2 S.C.R. 147 at 209, 31 D.L.R. (4th) 481 at 524 [hereinafter *Central Trust Co.* cited to S.C.R.].

[44] *Blinkhorn*, *ibid.* at 183.

[45] *Moorcroft*, *supra*, note 1 at 473.

[46] *Fletcher & Son* v. *Jubb, Booth & Helliwell* (1919), [1920] 1 K.B. 275 at 280-281 (C.A.), Scrutton L.J., cited with approval in *Aaroe & Aaroe* v. *Seymour*, [1956] O.R. 736, 6 D.L.R. (2d) 100 (H.C.), *aff'd* (1957), 7 D.L.R. (2d) 676 (C.A.) [hereinafter *Aaroe & Aaroe* cited to D.L.R.].

The notion that a solicitor is only liable for gross negligence is not foreign to Ontario jurisprudence or to Canadian law more generally.[47] Looking at the notion of gross negligence in various contexts, the judiciary has regarded it as a marked departure from the way in which an ordinary, responsible person would govern himself or herself. And as it relates to solicitors, this would be a marked variance from what a "normal prudent practitioner of the same experience and standing"[48] would do in comparable circumstances.

This being said, the attempt to restrict the solicitor's liability to *crassa negligentia* under the law of torts has not always been consistent.[49] Indeed, there is now considerable jurisprudence in which an action for professional negligence against a solicitor is said to be grounded solely in contract.[50] More recently, the Supreme Court of Canada has clearly rooted a solicitor's liability to a client in tort as well as in contract for the damage caused by a failure to meet the requisite standard of care.[51]

Essentially, under this concurrent or alternative liability, the aggrieved party has the right to assert the cause of action that appears to be most advantageous in respect of any particular legal consequence. This seemingly broader base for liability does not, however, remove or abolish the traditional mode of defence in professional negligence cases. As Lord Alness stated in *Vancouver General Hospital* v. *McDaniel*:

> A defendant charged with negligence can clear his feet if he shows that he has acted in accord with general and approved practice.[52]

In a number of significant cases over the years that statement has won the approval of the Supreme Court of Canada.[53] More recently, in the *Central Trust Co.*[54] case the Supreme Court reviewed the evidence of two solicitors in finding professional negligence as to their practices and that of other solicitors in real estate transactions involving corporations.

In *Moorcroft*, however, Mr Justice Smith chose to follow a line of lower court decisions and to refuse to hear evidence from practicing

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[47] *See, e.g., Aaroe & Aaroe, supra* at 101-02 (H.C.); *Brenner* v. *Gregory* (1972), [1973] 1 O.R. 252 at 258, 30 D.L.R. (3d) 672 at 678 (H.C.), Grant J.; *Mini-Mansion Const. Co. Ltd* v. *Agnew* (1983), 24 SASK. R. 1 (Q.B.); *Spence* v. *Bell* (1981), 28 A.R. 527, 16 ALTA L.R. (2d) 1 (Q.B.). *See also Rondel* v. *Worsley* (1967), [1969] 1 A.C. 191 at 287 (H.L.), Upjohn L.J.

[48] *See Aaroe & Aaroe, ibid.* at 101-2 (H.C.). *See also Central Trust Co., supra,* note 43 at 208.

[49] *See Fohrenkamm* v. *Plaxton,* [1973] 2 O.R. 518, 34 D.L.R. (3d) 470 (H.C.); *Compare Banks* v. *Reid* (1974) 6 O.R. (2d) 404, 53 D.L.R. (3d) 27 (H.C.).

[50] *Ibid.*

[51] *See Central Trust Co., supra,* note 43.

[52] [1934] 4 D.L.R. 593 at 597 (P.C.).

[53] *See, e.g., MacLeod* v. *Roe,* [1947] S.C.R. 420 at 424, 430, [1947] 3 D.L.R. 241 at 243, 248; *London & Lancashire Guarantee & Accident Co.* v. *Cie F.X. Drolet,* [1944] S.C.R. 82 at 86, [1944] 1 D.L.R. 561 at 564; *Vermont Construction Inc.* v. *Beatson,* [1977] 1 S.C.R. 758 at 770, 67 D.L.R. (3d) 95 at 103.

[54] *Supra,* note 43.

solicitors on any of a number of pertinent matters such as: (i) the current practice of solicitors in the specific area upon which the Court was focusing; (ii) whether the solicitor under review had adopted a customary practice of long standing; or (iii) whether the "general and approved practice actually used by the solicitor in question....[was] inconsistent with provident precautions against a known risk".[55]

While Mr Justice Smith acknowledged that a solicitor had to exercise only "such care and skill that is possessed by a person of average competence exercising a calling",[56] he was not prepared to hear evidence "of what other solicitors in the area do or did....in the course of their practice in respect of registered rights of way"[57] or with reference to matters (ii) and (iii) noted above.

Now there certainly appears to be past case authority for the proposition that following the practice of any ordinary, prudent solicitor is not a definitive defence. In that view *Polischuk* v. *Hagarty*,[58] and *Edward Wong Finance Co. Ltd* v. *Johnson, Stokes & Master*,[59] would surely be cited. However, in both those cases, the Court adopted its position after ascertaining that while the solicitor being reviewed had followed the conventional or general practice of solicitors, the practice itself was a clear departure from the contract of purchase and sale which had been brought to the solicitor to complete according to its terms.

Returning to the decision in *Central Trust Co.*, it was already noted that where concurrent liability in tort and contract exists, the aggrieved client has the right to assert the cause of action that appears most advantageous to him or her in respect of any particular legal consequences.[60] Accordingly, the net appears to be widely cast for solicitor negligence. However, the "concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort".[61] It is fair to say that if that last qualification of the Supreme Court of Canada were properly applied to the facts in *Moorcroft*, then the case against solicitor Kebe could not stand.[62]

It will be remembered that before bidding on the end unit, the Moorcrofts' lawyer advised his clients that he would have to charge a fee for his advice on any future offer they might wish to make. To avoid that charge, the Moorcrofts chose not to consult their lawyer prior to making the offer to purchase the end unit. Within a solicitor-client

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[55] *Winrob* v. *Street and Wollen* (1959), 28 W.W.R. 118 at 122 (B.C.S.C.). *See also Brenner* v. *Gregory*, *supra*, note 47.

[56] *Moorcroft*, *supra*, note 1 at 473.

[57] *Ibid.* at 474.

[58] (1983), 42 O.R. (2d) 417, 149 D.L.R. 65 (H.C.).

[59] (1983), [1984] 1 A.C. 296 (P.C.).

[60] *Supra*, note 43 at 206.

[61] *Ibid.*

[62] To appreciate the point to be made, reference may again have to be made to note 43 above.

relationship, that interaction must surely be seen as a model or classic example of what the Supreme Court of Canada has referred to as "contractual exclusion or limitation".[63] Certainly, the client could not complain that he or she was unclear as to what exactly was expressly excluded from the services to be rendered by the lawyer.

IV. Solicitor's Duty to Advise on Breaching a Contract

Finally, let us consider the fourth specific duty imposed upon the solicitor by Mr Justice Smith: the requirement to advise the client as to how to abort or breach a binding contract. Surely this requirement does not arise in all instances in which the lawyer is consulted about the contents and meaning of a previously signed and binding contract. Indeed, in most such situations where there is no indication of misrepresentation, undue influence or duress, the solicitor's primary duty must surely remain one of accurately advising his or her client as to the rights and obligations of the contracting parties. It would seem fundamentally at odds with the basic notions of orderliness and regulation in private law that a solicitor be required to give equal emphasis or even to "tag" every such consultation with advice on how to "best" breach a contract.

If unqualified, it would seem that such a requirement would in all likelihood give added opportunity, if not encouragement, to lawyers to inject their subjective views and make personal value judgments as to whether the contract being reviewed constitutes a good, fair or equitable bargain and this when it has been settled for over three centuries that it is improper to inquire into the "adequacy of consideration".[64] Finally, if the requirement were absolute, then it would inevitably spawn more litigation and less respect and regard for the process of setting down in a binding format the obligations, rights and duties of parties who find themselves in some business or other relationship.

The solicitor's duty to advise on how to abort or breach a binding contract should therefore arise in certain special circumstances where, for example, the client seeking professional advice makes it clear that, notwithstanding legal and moral commitment, the client wishes or intends to breach the contract. Accordingly, the solicitor's duty to advise as to how to abort an agreement (through mutual release, for instance) or to breach a binding contract (without the other contracting party's consent) is not absolute but arises in situations, like that found by Mr Justice Smith in *Moorcroft*, where the client would probably not have purchased had he or she fully known or understood all the provisions of the contract either before or after the agreement was signed.[65] If this is a correct appreciation of the fourth duty noted above, one is forced to ponder the consequences if a solicitor broaches or raises the subject of aborting or breaching a contract when the client has not initiated the

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[63] *Ibid.* at 206.

[64] *See, e.g., Couldery* v. *Bartrum* (1881), 19 Ch. 394 at 399 (C.A.).

[65] *Moorcroft, supra,* note 1 at 475.

query and expressly suggested or raised it as a probable desire or course of action. So much for the fourth specific duty.

V. Some Final Comments

Drawing back and looking at the *Moorcroft* decision as a whole, it is this writer's view that the case is yet another attempt to impose strict liability on the solicitor. That is, in effect, to require the solicitor to warrant or guarantee all his or her work and this even in the face of disclaimers or qualifiers as to the professional advice and services to be rendered. With the advent of negligence insurance and in an era of heightened consumer awareness and protectionism, the *Moorcroft* decision should then be heralded as harmonious with our times.

Unfortunately, as previously pointed out, the decision does not readily accord with prior, higher authority. Without attempting to analyze the policy or rationale behind those prior decisions, it is this writer's view that there remain good and cogent reasons for avoiding the inclination to make the solicitor a guarantor of all services. A few of those reasons have already been alluded to in this essay.

In closing, one further reason is highlighted. In all likelihood, imposition of strict liability on the solicitor will not create a better lawyer or a better served consumer. When reasonable skill and diligence may not be sufficient, when the usual and long-established practice of fellow solicitors is no certain safeguard, when provident precautions against known risk are not apt to protect, and when limitations and disclaimers related to the retainer are doubtful defences, then the solicitor's refuge lies not in trying to do more and to do better but, rather, somewhat like the control monkeys in Brady's experiments,[66] to do nothing and survive.

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[66] In J.V. Brady's experiments (1958) two monkeys, an experimental subject and a control subject were placed side-by-side in specially designed chairs. Although restrained, food and water were available to them. During alternate periods of six hour intervals, each monkey received a gentle shock on the foot every twenty seconds. One of the monkeys (the experimental or executive monkey) could avoid the shock if he pressed a switch in front of him. This monkey worked very hard at trying to avoid the frequent shocks and while very often successful at doing this, nevertheless, died from the anxiety and tension resulting from the ongoing task. The control monkey was punished just as much as the experimental monkey but having no control over the situation and not having learned to do anything about it survived. *See* C.T. Morgan, Introduction to Psychology, 2nd ed. (Toronto: McGraw-Hill, 1961) at 118.