

Payne v. Carr

Between
Howard Payne and 861158 Ltd., plaintiffs, and
Roger Carr, defendant, and
Vivian Reynolds and V and S Office Services, third parties
[1996] O.J. No. 4458
DRS 97-05108
Court File No. 94-CQ-50580CM and CMA
Ontario Court of Justice (General Division)

Greer J.

Heard: July 9-12 and 15-18, 1996.

Judgment: December 19, 1996.

(34 pp.)

— Negligence — Considerations in determining liability — Obligations or duties of a lawyer when acting for a client — Elements of negligent conduct — Error of judgment v. negligence — Particular negligent acts — Negligent advice — Defences — Knowledge of client — Prevailing standard of practice — Evidence and proof — Expert evidence.

Action against a solicitor for professional negligence in connection with a severance application of a portion of farm land. The lot was 200 acres in size and several severances had been made over the years. The plaintiff Payne completed a severance application in the name of the plaintiff company for a lot supposedly to be conveyed to his farm employee. On the application, the plaintiff stated that only one previous severance had been obtained, which was incorrect. The plaintiff confirmed the statements by a sworn affidavit. The evidence of a member of the committee of adjustment was that the severance would not have been granted so as to allow the property to remain in Payne's hands. The solicitor prepared a transfer of the land, with committee approval stamped on it, but was not instructed to register the deed. The evidence indicated that the farm employee had been let go by this time. Payne was insistent that the property be placed in his and his wife's name, and the solicitor suggested that he consult another lawyer. Payne instead consulted a paralegal, and fraudulently registered the deed with his and his wife's names handwritten in, instead of the farm employee's name. Payne claimed that the solicitor had suggested this. The Township obtained an order declaring the deed to be void. Payne was charged with and pleaded guilty to fraudulent registration of title. The solicitor was reprimanded by the Law Society after Payne complained of his conduct. The solicitor admitted that he had failed to clearly warn Payne against committing a criminal act.

HELD: Action dismissed. The solicitor was found not to be liable for negligence. The solicitor had never counselled Payne to make the alteration and, while he could have been more explicit in his warning to Payne, and probably should not have written out the instructions as he did, his actions did not constitute negligence. Payne was himself a member of the committee of adjustment and was deemed to be aware of the expectations and standards of the committee. He ought to have known that altering the deed when a severance was granted to a specific party was unacceptable. Expert evidence supported the solicitor's position in counselling Payne to comply

with the committee's decision rather than seeking judicial review, which would have been denied in the circumstances.

Statutes, Regulations and Rules Cited:

Planning Act, ss. 5(2)(iii), 51, 53(21). Professional Conduct Handbook, Rule 3.

Counsel:

J. Gardner Hodder for the plaintiffs.

J. Douglas Crane, Q.C. and Nancy L. Noble for the defendant.

¶ 1 **GREER J.**— Howard Payne ("Payne") is a 67 year old well-known farmer and entrepreneur and a former member of the Committee of Adjustment in Hamilton Township, County of Northumberland. Payne and his wife own the numbered company which is also a plaintiff in these proceedings. The plaintiffs have sued Roger Carr, their solicitor of over 20 years ("Carr" or the "defendant"), for professional negligence and for general and punitive damages in connection with a severance application of a portion of farm land owned by the numbered company, being Lot 20, Concession 6, Hamilton Township. The land had earlier been transferred by Payne and his wife to the holding company for estate planning and income tax purposes.

1. The History of the Farm Land

¶ 2 Payne had obtained several severances of portions of the farm land over a number of years. The Lot itself comprises approximately 200 acres of land and is long and rectangular in shape. The north end of the Lot is dissected diagonally by a severance of approximately 15.66 acres granted to Ontario Hydro which came about as a result of a Hydro expropriation which took place just before Payne purchased the farm. The severed area to the north of the Hydro lands was itself later severed into 3 separate lots, with the westerly portion comprising approximately 5.411 acres, the middle lot of small size, and the easterly lot of 14.732 acres.

¶ 3 The numbered company, which was incorporated by Carr on behalf of the Paynes, had obtained the land north of the Hydro severance from one of the Paynes for \$537,500. At the time of trial, the company owned the remaining 157.89 acres and Payne operated it as a working farm. In 1978, Payne had obtained a severance of 300' x 300' piece of the southwest corner which was transferred into the name of Payne's daughter, apparently "in trust", although no title search or title deed was produced to that effect. It was clear from the evidence that the land was transferred to the daughter only to circumvent the restrictions against severing of farm land, as the daughter, in turn, conveyed the land back to Payne in February, 1990. Payne then sold it in 1990 to a purchaser named Bransfield.

¶ 4 One of the northerly lots was conveyed to Payne's son in October, 1989, and it was sold conveyed to the McCormacks in 1990 for approximately \$79,000.

¶ 5 In May of 1990, Payne obtained a severance of a further lot of approximately .92 acres for himself as a retirement lot. This lot was then sold by Payne to Poole in April, 1991 for \$58,000.

¶ 6 The last severance which took place, and which is the subject of this litigation, is that of the farm employee's lot which was to be transferred to Payne's farm employee, Stephen Tinney.

2. The Tinney Severance

¶ 7 On May 6, 1991, Payne completed a severance application to have another lot along the westerly side of the numbered company's property severed for the benefit of Payne's farm employee, Stephen Tinney. This lot was to the north of the Poole lot but was also the same 200' X 200' dimension. Payne sent a letter of that date to the Hamilton Township Committee of Adjustment which he signed on behalf of the numbered company. That letter reads as follows:

We are applying for a lot severance for our farm employee.

He has been in our employ for eight years plus. He is married now and to have a lot to build a house near his work would be a great advantage for him.

The Application for Consent which was completed by Payne on behalf of the numbered company, without help from Carr, shows the name of the person "to whom land or interest in land is intended to be conveyed or leased", as "Stephen Tinney", with its proposed use noted as a "building lot for farm employee (full-time)". The purpose of the severance is said to be "severed Lot is for full time farm help".

¶ 8 It is important to note that Payne, in answering the question as to whether the owner had previously severed any land from the land holdings in which the land to be severed is situated, answered "yes" and said that one parcel had been created in 1990 as a retirement lot. This was not correct, as the evidence clearly shows that Payne had effected other severances of the land. Payne then swears an Affidavit, on behalf of the numbered company, which forms part of the Application. In that Affidavit, Payne declares:

All above statements and the statements contained in all of the exhibits transmitted herewith are true, and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

The Township office noted on the Application that a zoning amendment would be required to rezone it from agricultural use to "Severed-Special Rural (A-1)".

¶ 9 At the time of the new severance application, Payne was a member of the Township's Committee of Adjustment which dealt with the granting or the denial of such applications. Payne was present at the Committee's meeting on May 27, 1991 but apparently excused himself when his application was read. It is his understanding that no one opposed the severance. This proved to be incorrect, as the Committee's decision outlines the complaints of at least two persons as well as the complaint of the Ratepayers' Association of Hamilton Township.

¶ 10 The decision granting the severance states that the parcel is to be a "farm-related residential lot for a full-time farm employee", subject to three conditions, namely a park levy of \$750 had to be paid together with an impost fee of \$1,500 and the severed lot had to be rezoned to Special Rural (A-1). The decision also notes that the conditions mentioned must be completed within one year of being imposed and that the consent lapses two years from the giving of the certificate if not acted upon.

¶ 11 The decision also makes reference to the Ministry of Agriculture & Food's position as follows:

With present knowledge this Application complies with the Food Land Guidelines and this Ministry has no objections to its approval. The Food Land Guidelines makes provisions for a lot if for full time farm help.

It further refers to objections made by persons notified. One considered it a "...plan by Howard Payne to gradually add strip severances on Canning Road using the 'camel and the tent' technique". That objector pointed out that Payne had placed for sale signs on two other severances he had earlier received but had recently taken them down. Another person echoed the same objections.

¶ 12 The Planning Department's comments on the decision are in part as follows:

Section 5(2)(iii) permits lots to be created for farm-related residential uses subject to compliance with the Ag. Code of Practise, the lot is directed, where possible to the areas of the farm comprised of poorer soils and the lot is for the use of a son or daughter. The Food Land Guidelines states accommodation may also be provided for full-time farm help. Accommodation may be provided as part of the farm unit rather than on a separate lot in the form of a conventional dwelling or mobile home.

¶ 13 Gail Latchford ("Latchford"), a former member of the Committee of Adjustment, gave evidence on how the Committee operated when the application was made for the Tinney severance. Latchford gave her evidence in a straight-forward and compelling manner. Her evidence was that once the decision is made by the Committee, it moves on and cannot change it. The Deed is stamped by the Secretary/Treasurer of the Committee once the conditions have been met. If Council objected to the severance, they would have to appeal the decision to the OMB.

¶ 14 Latchford's evidence was that had Payne applied for the severance to be transferred into his name and that of his wife, it would not have been granted. One of the exceptions, in her municipality, said Latchford, was for a farm employee, and neither Payne nor his wife qualified as farm employees. Latchford remembered Carr appearing before the Committee and requesting that the severance be made to allow Tinney, the farm employee, to have a lot.

3. The Role of Stephen Tinney

¶ 15 Payne had, in the application, effectively lied to the Committee in saying that the employee, Stephen Tinney ("Tinney"), was the employee of the applicant numbered company. At no time was Tinney ever employed by the numbered company. He was at all times the employee of Payne. The numbered company was nothing more than a holding company which had no assets other than the lands and which did no business and which did not have employees.

¶ 16 It must be further noted that Payne said Tinney was given his termination notice in the late Spring of 1992. It was Payne's evidence that he was being pressured by the Bank to make increased loan payments and that he let Tinney go to cut down on his expenses. Payne's letter of termination to Tinney is, however, dated November 29, 1991 and states that it is "effective Jan 24, 1992". I did not find Payne to be a very credible witness in this area of his evidence nor throughout the Trial. Payne was vague and evasive in his answers, was seemingly unable to remember dates of transfers or severances, and constantly prefaced answers to questions raised in chief with the words, "I may have...". Payne was at no time willing to take any responsibility for the proceedings which I will hereinafter outline, and continually blamed Carr and others for the events which transpired after the Committee's decision.

¶ 17 Payne did not call Tinney as a witness at Trial. The evidence which was given by Payne and Carr about Tinney's role leads me to believe that Tinney's evidence would have been damaging to the legal position which Payne was taking. This is, in essence, confirmed by what took place later in the criminal proceedings against Payne. Payne was evasive when he was asked questions about what he told Tinney prior to the severance application and what Tinney's position was. Payne's evidence, that Tinney was quiet, reserved, a deep thinker on whom one did not "spring" things, did not have a ring of truth to it. Payne did not discuss his intention about the severance with Tinney before the application was made, nor had he discussed title or price with him. It appears that this severance, too, was another sham which Payne concocted to sever yet another piece of the farm land and somehow get it back in his own hands to be sold at a later date.

¶ 18 Clearly, the severance was not immediately proceeded with after the favourable decision was received, and it was not until Tinney was about to leave Payne's employ or shortly thereafter, that Payne moved with haste to effect the severance.

4. The Role of Roger Carr

¶ 19 Carr had been the Paynes' solicitor for about 20 years when the issue of the severance arose. He had previously acted for them on the earlier severances. I find that Payne approached Carr to attend the Committee of Adjustment hearing on the numbered company's behalf to have the severance stamped on the deed to Tinney, despite Payne's evidence to the contrary.

¶ 20 It is Carr's evidence that he was concerned about the Application, and spoke to Payne about it, since the Official Plan did not provide for the transfer of a specific lot to a farm employee. That designation was found in the Food Land Guidelines. Carr told the Court that Payne assured him there would be no difficulty and that he was prepared to transfer it to Tinney.

¶ 21 Once the decision was made, Carr applied for a rezoning of that land on Payne's behalf and it received approval at the end of July, 1991.

¶ 22 Carr wrote to Payne on July 31, 1991 to report on his attendance and to report that the rezoning by-law had passed on July 30, 1991, and would be finalized within 20 days. In that letter, Carr states in part:

In order to give effect to the severance it will be necessary to convey the property to your farm help and I would suggest that you could convey it for a full price of \$40,000.00 or \$50,000.00 and take back a mortgage for the full purchase price. Either Tinney buys the property from you for full value or he subsequently conveys it to you by way of Quit Claim Deed. In either case, the mortgage back would be set up in such a way that if he sold the property to someone else the mortgage would become due and payable or in the event that he re-conveyed the property to you, the mortgage would become merged with title and therefore disappear.

This letter, in my view, sets out what Payne really intended all along, that is, to get the severed property into his own name.

¶ 23 By letter dated January 3, 1992, Carr writes to Payne and encloses unsigned deeds "from Stephen Tinney back to the company". The letter states:

As you know, we have on file a deed from the company to Stephen Tinney, and that deed will be presented to the Township; once you have paid the lot levy and had the property surveyed. We would then attend at the Registry Office and register the deed from the company to Stephen Tinney, and immediately thereafter register the deed from Stephen Tinney back to the company. This format will technically comply with the Township's requirement that the deed go into Stephen Tinney's name. Since there was no restriction on the length of time that Stephen Tinney was to hold the property, the immediate conveyance back from him to the company would apparently meet the Township's technical requirements.

The Deed to Tinney shows the consideration as being \$39,500. Carr admits having discussed the mechanics of the May conveyance with Payne.

¶ 24 Carr knew Payne was not "giving" the land to Tinney. It is Carr's opinion that Payne is an extremely successful and intelligent person, who is not only canny but "street-smart". It was Carr's view that Payne had "struck a bargain" with Tinney. It was on Payne's instructions that Carr inserted the consideration of \$39,500 in the deed but there was no discussion as to how Tinney would come up with the money.

¶ 25 By March of 1992, Payne had still not paid the levies, nor had he obtained the rezoning. It is Carr's evidence that he checked this with the Township and asked, at that time, whether the Township would accept a deed in the name of someone other than Tinney. The answer was,

"no", it had to be in the name of the farm employee. This fact was conveyed by Carr to Payne, and I accept all of Carr's evidence in this regard. Carr proceeded to have the Deed registered, and at no time did Payne tell him not to do this. Carr took three copies of the Deed to the Committee and they retained one for their files. That left the matter of the Land Transfer Tax Affidavit to be dealt with. Carr had never received instructions from Payne to register the Deed.

¶ 26 The levies were paid on April 7, 1992 and the Consent of the Committee of Adjustment for the Township of Hamilton under Section 53(21) of the Planning Act is stamped on the Deed and dated the 7th day of April, 1992. Further, Carr's letter of April 9, 1992 to Payne makes it clear that his only involvement was to obtain the stamped deed from the Township and that Payne would attend to registration. When asked, at trial, whether Tinney was still an employee of Payne's on April 7, 1992, Payne could not answer the question.

¶ 27 Payne's evidence was that he talked to Tinney and told Tinney that he would like him to convey the lot back to him and that he would "give him \$3,000 sort of as a severance". Payne told this to Carr. I did not find Payne's evidence credible in this regard. In my view, the payment was not a "severance" payment but a payment to have the lot conveyed both ways. Payne and a representative of the bank met Tinney at Carr's office to effect the transfers but it appears that Tinney changed his mind (if he had ever agreed at all to the transaction) and no such transfer took place. Carr's view was that Tinney was "feeling crowded". Payne signed the Deed in Carr's office on behalf of the Company but Tinney did not sign the Deed conveying the property back.

5. The Break-down of the Solicitor/Client Relationship

¶ 28 Payne and Carr have two different views on what took place at Payne's home on April 7, 1992 when they met. Carr's evidence is that he went there to discuss the Land Transfer Tax Affidavit but never got around to it. Carr said that Payne immediately wanted something done about the Deed, as he was unhappy with it in Tinney's name and questioned whether there was any way it could be changed. Carr said there was not. It is Carr's evidence that Payne said, "What if we put our names on it?", and Carr told him it could not be done. I accept Carr's evidence in this regard. Carr was a very credible witness and was very open about all aspects of what happened. He said he told Payne that all representations to the Township were that the Deed was to be in Tinney's name, despite Payne's question as to why it could not first be "put in my wife's name and my name".

¶ 29 Carr said he felt the pressure building and after Payne enquiring several times as to who he should get, Carr told Payne to go to see Jim Sterling, another local solicitor.

¶ 30 It appears the solicitor/client relationship was at an end when Carr gave to Payne a handwritten outline setting out 8 steps for him to follow to effect the transfers. The first step reads: "Call Lawyer - Jim Sterling" ("Sterling"). By this point, it was clear that Carr was no longer acting on behalf of Payne. The outline states that Payne is to ask Sterling to prepare a deed from the company to William Howard Payne and Lillian Pauline Payne as joint tenants and transferees, with consideration being \$39,500. Carr's letter of April 9, 1992 to Payne is accompanied by his legal account for the lot severance. It reads in part to "...reviewing with you

alternatives and options concerning farm worker's lot and conveyance from farm corporation..." and also to the "...preparation of a new deed upon your instructions...".

¶ 31 Payne insisted, in his evidence, that Carr came up with the idea of the outline while they were at Payne's kitchen table on the evening of April 7, 1992. I do not accept Payne's evidence in this regard. I am satisfied that Payne's obstinance and insistence upon having the severed land transferred to him and his wife had pushed Carr to the point where he broke off the solicitor/client relationship. Carr had hoped that Sterling would set out the difficulties for Payne and that would end it.

¶ 32 Carr's evidence is that he told Payne, when Payne asked him what the consequences would be if the Deed was altered, that the "Township would not sit still". Carr further said that Payne asked him how to change the second page, and that out of sheer and utter frustration he "xxed out" Stephen Tinney and wrote above it "William Howard and Lillian Pauline Payne across the top", which he hoped would now dawn on Payne was not correct. Carr said he said to himself, "Good, that will fix the damn thing", making the two copies different and unregistrable. Carr added, "It was my way of destroying this particular deed". Carr then walked out. I accept Carr's evidence as to how this took place. In retrospect, Carr admitted it would have been better had he told Payne this would be fraudulent but in his view, Payne knew this, having been a member of the local Committee of Adjustment. I find, on the evidence that the Deed which Payne tried to register was not the Deed that Carr had, in frustration, written on.

¶ 33 Payne, however, never did attend upon Sterling and chose, instead, to ask the paralegal, Reynolds, to prepare some documents for him. I have concluded, on the evidence, that Payne presented Reynolds with the completed Deed, other than the Land Transfer Tax Act Affidavit, and that this Affidavit was prepared by her on Payne's instructions, showing the value of the transfer as \$2.

¶ 34 Payne tried to make out in his evidence that it was Carr's idea to cross out the original name of Stephen Tinney on that part of the Deed dealing with the severance approved and put his and his wife's names on it, and that the list was Carr's instructions on how it should be done. I did not find Payne's evidence credible that Carr told him this type of thing was done all the time, and I prefer Carr's version of what took place.

¶ 35 A Deed was registered on May 14, 1992 as Instrument Number 201831 whereby the numbered company transferred the property to William Howard Payne and Lillian Pauline Payne as joint tenants. The Deed contains, as page 2, a Schedule on which the same stamp of the Committee of Adjustment appears, as it had in the Deed to Tinney, with the names of William Howard Payne and Lillian Pauline Payne being hand-printed in the place where Stephen Tinney's name previously appeared. The names were altered on the document, which is a criminal offence as hereinafter noted. Page 1 of the Deed and the Land Transfer Tax Affidavit which was sworn by Payne, and commissioned by Reynolds, which is attached, are both typed on Newsome and Gilbert forms, whereas the Schedule with the Committee's stamp is typed on a Dye & Durham form. I am satisfied on the evidence that this Deed, which was later the subject of criminal proceedings, was not prepared by Carr. Payne finally admitted on cross-examination that Reynolds prepared the Land Transfer Tax Affidavit and assisted in part with the preparation

of the Deed. Reynolds was added as a Third Party to these proceedings, as was her unincorporated business, but she did not participate at trial and it appears that the action against her was discontinued although the Trial Record did not indicate this.

¶ 36 Carr's evidence is that he was not surprised to learn that Payne had altered the Deed. In Carr's view, Payne wanted the lot, had always been a resourceful person and that greed was his base motivation in carrying out the task. He admitted, however, that he knew that Payne was being pressed by the bank.

6. Legal Proceedings Against Payne

¶ 37 On July 24, 1992, the Township brought on an Application against the numbered company, Payne and his wife, for an Order declaring the Deed void and for an injunction restraining them from disposing of their interest in the severed land. It was the Affidavit evidence of Kathleen McNamara, the Planning Co-ordinator for the Township, sworn July 24, 1992 in support of the Application, that she would not have certified the Deed if the transferees had been shown in it as the Paynes.

¶ 38 Mr. Justice Tobias, on the Application, declared, in his Judgment dated November 25, 1992, that the Deed was void. He also declared that the Certificate of the Committee of Adjustment attached to it was void. The Paynes and their company were ordered to pay costs fixed at \$1,000. The legal proceedings, however, did not end with this Judgment. Payne was later arrested and charged with uttering a forged document and with fraudulent registration of title, contrary to the Criminal Code. Payne, who was represented by counsel, pleaded guilty to the second offence and was fined \$650 and was put on probation for 8 months. The first charge was then dropped by the Crown.

¶ 39 On cross-examination, Payne conceded that Tinney was to have been a witness at Payne's criminal trial but he would not admit that he had seen the "willsay" statements of the Crown witnesses before he agreed to plead guilty to the second count. Again, I did not find Payne's evidence to be credible, as the Crown would have had to make full disclosure to him of these willsay statements prior to the trial or the plea being taken. Tinney's evidence, as outlined in his willsay statement, was that Payne asked him if he could use his name "to get a lot".

¶ 40 Peggy Louise Cramp, the Chief Administrative Officer for the Township, swore, in her Affidavit of July 24, 1992, that Payne had phoned her office and asked her if the Certificate on the Deed could be stamped in the name of someone other than Tinney. Cramp advised Payne that it could not. It was her view that the Paynes wanted the severance so that they could sell the lot to someone else, as they had the retirement lot. Payne was of the view that the Township did not like him politically.

7. The Expert Reports

¶ 41 Since the plaintiffs are suing Carr for negligence in his role as their solicitor, each side presented experts on the role of Carr and his advice and steps taken by him. Stephen Ponesse ("Ponesse"), an expert in real property matters and one who has practised in the area for the past

15-17 years, gave evidence as Payne's expert. Ponesse is very versed in Planning Act matters and Committee of Adjustment procedures. He disagreed with Carr's experts on the legal implication of the wording on the Committee of Adjustment form that the property had to be transferred to a full-time farm employee. In his view, this was not a condition precedent as set out in Section 51 of the Planning Act.

¶ 42 Ponesse took the position that once the Committee of Adjustment gave their consent to the severance, it stood at that. In his view, the conditions could be appealed and the Committee could not impose a condition to ensure that the severed lot went to a farm employee. Further, Ponesse, was of the opinion that the owners could move to have the condition struck if they decided to convey it to someone other than a farm employee. He said that you can apply for a severance in a vacuum where no name of the transferee appears (as takes place in 99% of the cases) and with no name of the applicant.

¶ 43 Ponesse emphasized that there were certain rights of appeal from Committee of Adjustment decisions to the OMB and in some instances to the Divisional Court. He said that counsel acting on these applications for severances ought to be aware of the appeal rights. Costs of such an appeal could range from \$2,500 to \$3,000 for an appeal to the OMB to a much more substantial amount if the issue went to the Divisional Court.

¶ 44 Donald H.L. Lamont Q.C. ("Lamont") was one of the defendant's expert witnesses. He disagreed with Ponesse's opinion that the Committee of Adjustment had no authority to refuse to stamp the Payne Deed. It was Lamont's opinion that the Application was specific to Tinney and that the Committee did not have the authority to grant an Application in the Paynes' names. Lamont confirmed Latchford's understanding of how the Committee looked at the Food Land Guidelines. Lamont was firm in his opinion that the Deed to the Paynes was not within the parameters approved by the Committee. It was Lamont's opinion that the designation of the Application in Tinney's name was not a condition but was the very objective of the Application that was dealt with by the Committee and that the only available severance was to Tinney.

¶ 45 Lamont further was of the opinion that the oral decision of the Committee not to stamp the Payne Deed was the correct one, as it had already finished with the approved Application of Tinney for the same piece of land, which was a specific severance. Lamont agreed that Tinney, if the land had been transferred to him, could have conveyed it the next day to someone else, but he was of the view that the Ratepayers in the area would have complained unless good faith could be shown.

¶ 46 Lamont would not have advised the client to attempt judicial review of the decision before the Divisional Court. In his view, this would have been an ill-advised step since the Application was specific and it had been dealt with. The Committee, in its decision, used the very words which had been in the Application.

¶ 47 Lamont's evidence was that one only needed one original deed for registration purposes and that the duplicate deed could be a photocopy, if no other original was available. I have concluded that, given that there were three originals of the Tinney Deed, with one being left with the Committee and two given to Payne by Carr, and one being "x'd" and marked by Carr at

Payne's home, the final deed in the Paynes' names was altered by Payne and was the Deed which he presented for registration.

¶ 48 Lamont did concede that sometimes minor changes to deeds, such as the change to a municipal roll number, get made at the registry office but that these are not matters of substance. He further agreed on cross-examination, that a prudent solicitor would explain the implications of a client's instructions to him or her.

¶ 49 Garth Manning Q.C. ("Manning") also provided expert evidence on behalf of Carr. Manning confirmed much of what Lamont had said, and he, too, disagreed with Ponesse's analysis of what a condition was when the Committee of Adjustment attaches them to severances. In Manning's view, the restriction of the transfer of the lot to a farm employee was not a condition and is not listed as such by the Committee.

¶ 50 Manning said that the governing document is the Official Plan and the Food Land Guidelines are government policy. Further, he said that Tinney's name had to be put on the deed or the Committee would not have granted the severance. In Manning's many years of experience in this area of the law, he said that in Metropolitan Toronto the Committee of Adjustment would simply not stamp a deed where the name of the transferor was not completed on the deed. In his opinion letter dated February 2, 1996, Manning states at p. 5:

From all of the above, it is abundantly clear in my view that the Committee was being asked to consider a discrete application with its own personalized characteristics. The Committee had no option but to consider the Application as one for consent to conveyance to a named full-time farm employee, Stephen Tinney, (for whom it would be "a great advantage" to "have a lot to build a house near his work").

Manning then went on to state:

I am not attracted by the allegation that Carr should have advised Payne (at a very late stage) that the Committee decision could be subjected to judicial review. To have given such advice would have been nonsensical in the circumstances and completely contrary to common sense. I cannot, given the facts, imagine it as having been the duty of a prudent Ontario real property lawyer so to advise.

¶ 51 Where the expert evidence given by Lamont and Manning differ from that of Ponesse, I accept the evidence of Lamont and Manning. In my view, the severance received for the Tinney lot was a specific severance for a specific purpose. All of the evidence of local Committee members and persons employed by the Township is that the Paynes would not have personally received the severance. I agree with Carr's view that greed motivated Payne and in the end, Payne was the author of his own misfortune.

8. Value of the Land

¶ 52 Peter Schmitz ("Schmitz"), a Cobourg realtor, gave evidence as to land values on behalf of Payne. After reviewing Schmitz's qualifications and his report, I was not prepared to declare him as an expert witness. He did, however, give general evidence of values in the area. Schmitz had listed other properties owned by Payne prior to the Trial and had reviewed what he considered comparative properties to the Tinney lot. Schmitz said that the value of properties in the area had dropped in value approximately 20-25%, and in some cases 30%, from April, 1992 to the present. A property similar to the Tinney lot sold for \$28,000 in May, 1995.

¶ 53 Having reviewed Schmitz's comparatives and knowing that he is very familiar with the lands in question and the Township in general, I am prepared to accept that the Tinney lot had a value of approximately \$35,000 when it was severed and has a present value of approximately \$28,500.

9. The Consequences for Carr

¶ 54 Payne complained about Carr's conduct as a solicitor to the Law Society of Upper Canada ("LSUC") by letter dated April 20, 1993. Carr was charged with professional misconduct by the LSUC, received a reprimand in Convocation and had to pay the legal costs of the LSUC of approximately \$5,000. There was substantial publicity in the Cobourg area about the case and Carr admits that it was a very difficult period for him and his family. He was of the view that it had an even more devastating effect on his wife, who was very involved in the community.

¶ 55 Given the evidence which has emerged in this Trial, I find Payne's letter to the LSUC to be less than accurate in its detail. Payne tells the LSUC that "both Mr. Carr and I believed that my wife and I were entitled to a transfer of the lot from our company...". This is simply not so from Carr's position and from his evidence. Further, Payne indicates that the steps they took regarding the transfer were on Carr's instructions. Again, this is not so. While it would have been preferable if Carr had not prepared the outline for Payne, I am satisfied on the evidence that he did not counsel Payne to do what he did nor did he erase Tinney's name on the severance page as was suggested by Payne.

¶ 56 Carr was found by the LSUC to have failed to fully and candidly advise his client concerning the alteration of a deed of land and failed to properly advise Payne to guard himself from becoming involved in the registration of a false document. Further, Carr admitted that he should have firmly advised Payne that the alteration and subsequent registration of a document once it had been stamped for severance, constituted a criminal offence.

¶ 57 On cross-examination before me, Carr admitted that Payne had generally followed his advice over the years. He further acknowledged that he had a good reputation in the community as a solicitor. In retrospect, Carr agreed that he should have told Payne not to alter the deed and he candidly admitted that the "Law Society dealt with me as a result of the failure on my part". Carr never wavered in his evidence, however, that Payne knew what they were talking about and that Payne knew it was wrong to have altered the deed and that he told him that the Township would not sit on it.

10. Was Carr Negligent in his Dealings with Payne?

¶ 58 I have concluded that Carr, as Payne's solicitor, was not negligent in his dealings with Payne. Payne, as I have said, was the author of his own misfortune. While it would have been preferable for Carr to have told Payne the consequences of what it was Payne was intending to do, it was not negligence on Carr's part not to have done so. Payne was a former member of the local Committee of Adjustment and is deemed to have known the procedures before the Committee and the role of the Committee and why it was that they would not have condoned or accepted the transfer into the Paynes' names. While Carr, on the other hand, ought not to have allowed Payne to bully him into writing the outline that he did, Carr did, however, tell Payne to consult Sterling, another solicitor, and Payne chose not to do this, to his own detriment.

¶ 59 Further, from the evidence before me, it is clear that Payne never really told the whole story nor did he give a clear picture of what actually took place in his meeting with Carr, to those persons or professionals he hired on behalf of either himself and his wife or their company. For example, Payne brought Carr in at the last minute to appear before the Committee of Adjustment regarding the Tinney lot; he chose to attend on a person who is not a barrister and solicitor and who held herself out as a paralegal, to complete only part of a Deed of Transfer; and he did not provide the LSUC with a full briefing in his letter when he complained of Carr's conduct.

¶ 60 The money from all of Payne's various exemption severances of the farm land always ended up in his pocket or that of his wife, even though the severed property was first transferred to his daughter or his son or to himself as a "retirement lot". I am satisfied, that from the beginning, the whole purpose of the alleged Tinney transfer was to once again get more money into Payne's pocket.

¶ 61 Much was made at Trial about Carr's failure to advise Payne to either appeal the Committee of Adjustment's severance or to take the matter to judicial review. I am satisfied that these were not the appropriate routes to take, since all of the evidence before me was that the Committee would never have granted the severance to the Paynes in the first place. I do not accept the proposition that Payne would have followed his solicitor's advice, if his solicitor had told him not to attempt to obtain the transfer into his name and that of his wife. Payne did not properly seek out Sterling's advice when told to do so nor did Payne have Sterling prepare a deed, as Carr had set out in step two of the outline.

¶ 62 Carr naively, and in complete frustration, wrote the list for Payne but told him that the Township would not sit still, thereby putting Payne on notice. Payne altered the Deed, changed the pages and added a Land Transfer Tax Affidavit and then had it registered, thereby breaking any causal connection in the steps which were outline on the list provided by Carr. Carr was neither a party to the forged document nor a party to the registration of the new Deed.

¶ 63 The Professional Conduct Handbook of the LSUC, 1995 edition, notes in Rule 3 that the lawyer must be both honest and candid when advising clients. In the commentary, at paragraph 6, it is further pointed out that the lawyer must:

... never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment. The lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client.

It must be remembered, however, that at no time did Carr counsel Payne to commit a crime and at no time did he assist Carr in abetting a crime. Carr told Payne to seek further legal advice which he chose not to do.

¶ 64 The Supreme Court of Canada, in *Central Trust Co. v. Rafuse* [1986] 2 S.C.R. 147 at p. 148, held the following:

A solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his "working knowledge", without the need of further research, but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points. The duty in respect of knowledge is stated in 7 Am Jur 2d, Attorneys at Law & 200, in a passage that was quoted by Jones J.A. in the Appeal Division, as follows: "An attorney is expected to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques".

and at p. 209:

The decision is nevertheless instructive concerning the duty of a solicitor to perceive problems and to warn the client of them. For a statement of the solicitor's duty "to identify problems and to bring their effect to the attention of the client"...

¶ 65 Carr was a solicitor and not a practising barrister. Carr did not practice in the area of criminal law. He would, however, have known that the alteration of that part of a Deed which had the Committee of Adjustment's stamp on it, approving the severance of the piece of property for Stephen Tinney, was improper and illegal. There was no evidence before me, however, that Carr ever counselled Payne to make such alteration and to present the document for registration. I can find no contributory negligence on the part of Carr. Carr's alteration of one of the copies of that page to destroy it may have been stupid, but at no time did he condone or advise Payne to alter the page.

¶ 66 I have reviewed the case of *Major v. Buchanan et al.* (1975), 9 O.R. (2d) 491, a solicitor's negligence case. There the Court found that if the solicitor fails to exercise reasonable care and skill in advising the client with respect to the risk, and if the client probably would not have undertaken the course of action if he or she had been properly advised, the solicitor would be liable if the client suffers any loss thereby. At p. 508, the Court quotes Lamont, who also appeared as a witness in the Major case, in noting that he stated that "explaining the implication

of a client's instructions is the expected practise of a prudent solicitor". I have also considered the following passage in County Personnel (Employment Agency) Ltd v. Alan R Pulver & Co (a firm) [1987] 1 All E.R. 289 (CA) at p. 295:

It seems obvious that legal advice, like any other communication, should be in terms appropriate to the comprehension and experience of the particular recipient. It is also, I think, clear that in a situation such as this the professional man does not necessarily discharge his duty by spelling out what is obvious. The client is entitled to expect the exercise of a reasonable professional judgment. That is why the client seeks advice from the professional man in the first place. If in the exercise of a reasonable professional judgment a solicitor is or should be alerted to risks which might elude even an intelligent layman, then plainly it is his duty to advise the client of these risks or explore the matter further.

¶ 67 I have concluded that Carr's first instruction to Payne was to obtain the services of another solicitor, Sterling. The second instruction was to "ask him to prepare a deed" and in that he notes that the company owns the farm and is "selling a piece of land already severed...". Carr then basically sets out the information which Sterling would need to complete the deed. Carr's evidence at Trial was that Sterling would point out the problems to Payne, although, as I have already noted, I am convinced that Payne knew what it was that he was doing. Carr explained, in so many words, the implication of Payne's instructions, by severing the solicitor/client relationship. While Carr could have been more explicit in his warning to Payne about what it was he was embarking on, and while in retrospect, it would have been better had Carr written nothing at all, I have concluded that there was no negligence on Carr's part.

¶ 68 If I had found Carr to have been negligent or contributorily negligent in his dealings with Payne, Payne would have been entitled to certain damages. I accept that Payne had the following out-of-pocket expenses:

1. Carr's account of April 9, 1992	\$ 246.10
2. Legal costs on application	\$ 1,000.00
3. Fine	\$ 650.00
4. Legal fees of Stewart, Mitchell	\$ 9,542.87
5. Lot levy and park levy	\$ 2,250.00
Total	\$11,438.97

It is interesting to note, however, although neither counsel raised the issue with me, that the property was owned by the company, not Payne, and the expenses for the levies and Carr's account were technically those of the company. Payne would have had to have given a shareholder's loan to the company so that it could properly fund the severance, as the company virtually had no cash on hand to pay these expenses, nor was it an operating company.

¶ 69 Again, the difficulty I have with quantifying the loss of the severance by Payne, is that the property was owned by the company. Neither counsel raised this point but, given that the

company owed money to each of Payne and his wife by way of note or other evidence of indebtedness, the transfer presumably could have been effected by way of reduction of the amount that was owing to them. Since the Supreme Court of Canada in *Semelhago v. Paramadevan* File No. 24325 (S.C.C.) Unreported, June 20, 1996, has pointed out that in actions for specific performance in real property transactions, the damages that are awarded must be a true substitute for specific performance, and that the fact that a different amount of damages would have been a substitute if the order had been made at the time of the breach is irrelevant, I fix the Payne's damages as at the date of Trial at \$28,500, being the current value of the property. Further, if I had found Carr liable, the Paynes would have been entitled to their reasonable party and party legal fees, if no offers of settlement had passed between the parties.

¶ 70 Even if I had found Carr liable, I cannot see how Payne would have been entitled to punitive damages. Payne pleaded guilty to the charge under the Criminal Code and any of the publicity surrounding the charge and the conviction were of his own making. Carr suffered a great deal from the adverse publicity in the local area, after the LSUC's finding against him and is out-of-pocket for the \$5,000 costs against him. He has, even if he were liable, already paid the price for his dealings with the Paynes.

11. Costs

¶ 71 If the parties cannot otherwise agree on Costs, I may be spoken to.

GREER J.