THE *WESTWARD FARMS* CASE (OR WHY MANITOBA REAL ESTATE AGENTS SHOULD FORM A CIRCLE WITH THEIR WAGONS)

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The recent Manitoba Court of Appeal decision of *Westward Farms Ltd. and Deniau* v. *Cadieux et al.*[1] should serve to give local real estate agents and real estate practitioners ample reason for cogitation. The events involving the *Westward Farms* decision began to ensue when a group of prospective European purchasers expressed a desire to purchase farm land in Manitoba. Messrs. Robert Fillion and Armand Durand were registered real estate agents, employed by MaKague Sigmar Realty Ltd.. Acting on behalf of McKague, a registered broker, Fillion, during the month of May, 1977, obtained a listing agreement from the defendant Cadieux for the sale of his farm. Fillion advised Durand, his colleague, about the availability of the property shortly after the listing agreement was signed. Durand then advertised the property for sale in France. As a result of these advertisements, one Mr. Deniau, (who ultimately became the signatory of an offer to purchase directed to Mr. Cadieux), corresponded with Mr. Durand. Upon receipt of Deniau's correspondence the matter was turned over by Durand to one Mr. Segur. Segur was a landed Canadian immigrant who apparently was familiar with both Mr. Deniau and other prospective French purchasers. An agreement was entered into between the broker and his employees and Mr. Segur that a "finder's" fee or "consultant's" fee would be paid to Mr. Segur by the broker should any sale be made to the group of persons with whom Mr. Segur was acquainted. In common real estate parlance, Mr. Segur would be known as a "bird dog". It thus transpired that shortly after the listing of Mr. Cadieux's property, Mr. Deniau and his wife, accompanied by one Mr. Lacroix and his wife journeyed to Canada in order to view the Cadieux property, amongst others. Segur was also present at the viewing of these properties, and apparently he also became actively involved as a prospective purchaser.

On May 31, 1977 an offer was made to Cadieux subject to the "satisfactory closing of transactions" with respect to five other parcels of land. The purchaser, as stated in the offer, was "Deniau or nominee". The offer was accepted by Mr. Cadieux on June 1, 1977. At that time the purchasers were not sure whether title would be taken in the name of Deniau or Segur or all of them personally or by a corporation on their behalf. After Mr. Cadieux had signed the acceptance, as vendor, the agents subsequently went to see Mrs. Cadieux who also signed the acceptance portion of the offer. During the month of August, 1977, Mr. Lacroix returned to Manitoba from France as he was desirous of changing the payment provisions contained in the offer. Both Mr. & Mrs. Cadieux agreed to the changes suggested by Mr. Lacroix. These changes were put into the form of a written memorandum and duly signed by both Mr. & Mrs. Cadieux. Mr. Deniau, the nominal purchaser referred to in the relevant offer and acceptance, assigned his rights under the sale agreement to Westward Farms Ltd., one of the plaintiffs. Westward Farms Ltd. was a Manitoba company incorporated in January 1977, the issued shares in which were owned equally by Segur and his wife.

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1. [1982] 5 W.W.R. 1 (Man. C.A.).

At the time the Deniau offer was entered into, one Louis Barnabe was a tenant occupying the Cadieux farm land pursuant to a one year leasing agreement. A right of first refusal was inserted in Barnabe's lease in order to protect Barnabe in the event that the property in question was sold by Cadieux. Both Barnabe and Westward Farms endeavoured to exercise the rights purportedly granted to them under their agreements with the defendant Cadieux. Westward Farms Ltd. and Deniau sued for specific performance as did Barnabe under the right of first refusal contained in his lease agreement. Both of these causes of action were consolidated for the purposes of trial, and the matters were heard by Wright, J. of the Manitoba Court of Queen's Bench. At trial[2] Wright, J. held that the offer of June 1, 1977, as amended on August 24, 1977 was a binding contract between Deniau and Cadieux for the sale of the farm for $93,000. In the Barnabe action Wright, J. ordered Cadieux to pay damages of $32,000. to Barnabe to cover Barnabe's lost opportunity to exercise his right of first refusal. However, this award was offset by giving judgment to Cadieux in the sum of $24,800, which Barnabe was to pay as rental for the crop years 1977-1980. Cadieux appealed from the judgment in both actions and Barnabe cross-appealed as did Westward, but Westward subsequently abandoned its cross-appeal. The Court of Appeal predicated its decision on four main points, namely:

1. The Dower Act
2. The Real Estate Broker's Act
3. Contractual "Conditions Precedent"
4. Contractual Uncertainty — The Designation of the Purchaser as "Deniau or Nominee"

We shall deal with these four points *seriatem*.

I. *The Dower Act*

The action of Barnabe, the tenant, was summarily disposed of on appeal. As the court unanimously held that the agreement between Cadieux and Westward was void, there was nothing upon which Mr. Barnabe could append his right of first refusal, and therefore it was non-operative. Apart from this, the court also upheld Wright, J's. finding that the Barnabe agreement was invalid in that it did not comply with the relevant provisions of *The Dower Act*[3] relating to the consent or release to disposition of the homestead by the wife, pursuant to Section 3 of said *Act*. In this context, Wright, J. specifically referred to the right of first refusal to purchase granted to Barnabe by Cadieux. This most certainly is a "disposition" of the homestead within the meaning of the *Act*, and therefore the result reached was unassailable. It is interesting to note that this first refusal right was incorporated in a lease having a term of one year only, and, therefore, such a consent would not be necessary insofar as the landlord & tenant estate was concerned in that such estate was not a "lease for more than three years" within the meaning of Section 2(c) of *The Dower Act*. Pragmatic considerations are involved here in that not all real estate practitioners are fully cognizant of the fact that in the case of homestead land, one should

2. *Westward Farms Ltd. and Deniou* v. *Cadieux et al.*, [1981] 3 W.W.R. 673 (Man. Q.B.) (herinafter referred to as *Westward Farms*).

3. R.S.M. 1970, c. D 100.

be ever mindful of the possible need for an appropriate consent. This is important even in those instances where a possible disposition is contingent and speculative, such as in the case of a first refusal right.

The matter of strict technical application of Section 3 of *The Dower Act* relating to the Westward Farms action was much more contentious. The Court of Appeal made specific note of the significant distinction between a normal disposition of the homestead as contemplated by Section 3(1)(a) of the *Act* and that of having an estate or "interest in the homestead in addition to her rights under the Act"[4] as set forth in Section 3(1)(d). If the situation was such as envisaged by the said Section 3(1)(d) then her signature on the acceptance would have been a sufficient compliance with the *Act*. However, as this was disposition of the homestead wherein Mrs. Cadieux did not have any registerable or possessory interest other than that of her inchoate dower rights then her consent would have to be "explicit and unequivocal"[5] and presumably, the court would have to be satisfied, on the evidence, that she rendered fully aware of the nature of the transaction that was entering into. Whether a specific written acknowledgment as contemplated by Section 5 and 8 of the *Act* would be required was left open by the Court of Appeal.

From a practical point of view, it would appear that the prudent course would be, in all instances, to obtain a specific written consent of disposition and acknowledgment in compliance with the full technical requirements of *The Dower Act*. The standard real estate board Offer to Purchase form relating to the sale of residential properties has had incorporated in it, for quite some years now, a portion relating to such a specific consent to disposition of the homestead. Unfortunately, this was not the case as regards the standard "I.C.I." ("Industrial Commercial Investment") Offer to Purchase form prescribed by the Manitoba Real Estate Board for non-residential transactions. This situation was rectified, as I am informed, as a direct result of the *Westward Farms* decision. The real estate board standard "I.C.I." Offer to Purchase form now has imprinted upon it a note relating to "Dower Act" provisions and a corresponding Consent to Disposition and Certificate of Acknowledgment by the wife to such consent. In the case at bar, the standard "I.C.I." form that was utilized did not contain this written material.

Instances of non-compliance with the requirements of *The Dower Act* should now be rendered less frequent with the utilization of the new Manitoba Real Estate Board form. However, brokers and agents should be sensitized to an awareness of the overriding sanctity of the homestead provisions incorporated in legislation extant across our three prairie provinces. Practical considerations are brought to bear here, for it is not too often that a real estate agent out in the field is authorized to swear written acknowledgments as may be required from time to time under relevant homestead legislation. However, it is no answer to this problem to blandly assert that perhaps our courts are not overly sensitive to the practicalities of day to day real estate practice. The jurisprudence of the Western Canadian jurisdictions are rife with examples of transactions that have been voided simply because of non-compliance with

4. *Supra* n. 1, at 10.
5. *Ibid.*

existing homestead legislation. Within the last ten or fifteen years there has been an amazing upgrading in the education, sophistication and quality of real estate agents and brokers and an awareness of the problems that can possibly arise should be a salutary method of coping with possible "Dower Act" contraventions in the future.

II. *The Real Estate Brokers Act*

There is no question that Segur was to be paid a "bird dog" fee by the listing broker. It is equally obvious that Segur was not a "licensed" broker or salesman within the provisions of *The Real Estate Brokers Act*[6] nor was it contradicted in evidence that Segur was one of the principal shareholders of Westward Farms, the plaintiff. Even though not specifically licenced under the *Act*, the court specifically held[7] that Segur was a real estate "salesman" as defined by Section 2(q) of *The Real Estate Brokers Act*. Segur and Westward were also categorized as "associates" within the meaning of Section 19 of the said *Act*.

The Real Estate Brokers Act, by specific statutory enactment, recapitulates much of the fiduciary responsibility incumbent on a broker or salesman. In essence, an agency position is that of a repository of trust. Therefore, the court held that, by virtue of employing Segur as a "bird dog", the listing and selling broker and salesman (in this instance, the same parties) disqualified themselves not only from the receipt of any commission that may have become due and payable to them, but that also Cadieux lawfully and properly rescinded the sale by serving appropriate notice upon McKague within the prescribed 30 day period, as provided by Section 19(6) of the *Act*. The point made by the court was obvious, in that if there is any possible conflict of interest insofar as any of the parties who "negotiate" a real estate transaction are involved, they do so at their own peril and must ultimately bear the consequences. There is an object lesson here for brokers and salesmen and real estate practitioners.

The appeal court did not refer to Section 24 of *The Real Estate Brokers Act*, which is an express prohibition against the employment of any unregistered salesmen. Perhaps, under the circumstances, they did not think it necessary to do so. The question that is left unanswered is whether or not a "bird dog", under any circumstances, can be paid a remuneration. The answer is obvious in the "Westward Farms" case as Segur was to be paid a fairly substantial portion of any commission that would ultimately be payable by Cadieux to the broker. However, one could hypothesize a set of circumstances that could prove to be very near the line. What would the situation have been if Segur, say for example, had been given an expensive present rather than an outright cash gratuity? There are no "full disclosure" provisions, per se, in *The Real Estate Brokers Act*. This might ultimately become a problem to be resolved by the legislature.

6. R.S.M. 1970, c. R 20.
7. *Supra* n. 1, at 18.

III. "Conditions Precedent"

O'Sullivan, J.A. concurred in the disposition of the appeals as set out in the reasons for judgment of Matas, J.A., and came forth with some additional reasons of his own.[8] The amended agreement expressly set out the following conditions:

> 'This offer is subject to the following conditions (if any): (1) Subject to financing being confirmed in writing on or before August 31, 1977; (2) Subject to acceptance and satisfactory closing of transactions with Kreitz, Roger, Rene and Ulysses Dupuis and Arthur Devigne (offers bearing same date); (3) Taxes to be paid in full to December 31st, 1977, by vendor.
> ...If any conditions set out in this offer [are] not fulfilled then Offer shall become null and void and deposit returned to purchaser.'[9]

The purchasers had satisfactorily concluded all the transactions referred to in the amended offer to purchase, with the exception of the Devigne deal. At trial, Wright, J. held that the condition relating to the closing of the five deals aforementioned was a "true" condition precedent, as exemplified in the well known cases of *Turney* v. *Zhilka*[10] and *Barnett* v. *Harrison*[11]. That is, that particular condition was contingent upon the "performance" of the contract of the parties, rather than the "formation" of the contract by the parties. As such, this "true" condition precedent and because it was for the benefit of the purchaser, it could not be waived by him. Nevertheless, Wright, J. held that the defendent vendor, Cadieux, was well aware of the non-completion of the Devigne transaction and had indicated to Deniau, the nominal purchaser, that he was prepared to continue the deal and thus, impliedly accepted the waiver of the transaction by the purchaser. Therefore, Cadieux could not avail himself of the defence of "true" condition precedent.

On appeal, O'Sullivan, J.A. overruled Wright, J.'s finding of fact that Cadieux had accepted the waiver of the condition precedent in contention by Cadieux, and thus found a further reason for declining to enforce the agreement between the vendor and the purchaser.[12]

The writer candidly confesses that he, along with other commentators in this particular field of the law, cannot fully accept the logic that underlies judicial reasoning in this regard. I readily admit that there is a strong element of fairness inherent in the argument that a rising real estate market may, in some instances, grant to a purchaser an undue advantage in giving to the purchaser the option of whether or not to waive a particular condition. But surely logic can be marshalled on the other side of the argument, by maintaining that it flies in the face of reason not to allow a party to waive a condition that has been inserted in a contract solely for his benefit. It appears to the writer that the sounder judicial philosophy would be to give effect to the true intention of the parties in any contractual arrangement, and thus amplify the enforceability of contracts, rather than derogate from their future performance. Surely, when

8. *Supra* n. 1, at 20 *et seq.*
9. *Supra* n. 1, at 23.
10. [1959] S.C.R. 578.
11. [1976] 2 S.C.R. 531.
12. *Supra* n. 1, at 24.

Cadieux entered into the transaction in question, he was willing to assume the risks inherent in the conditions granted in favour of Deniau.

However, pragmatism compels us to accept the law as it is, rather than what it should be. Until such time as the Supreme Court of Canada rules otherwise, those engaged in the day to day practice of real estate should be fully apprised of this legal pitfall for the unwary. The unexpected avoidance of, what at first blush appears to be a perfectly valid binding contractual arrangement, can lead to both unexpected and unpleasant repercussions.

IV. "Or Nominee"

It is this last point that to my mind has the most far-ranging implications arising out of the *Westward Farm* decision. O'Sullivan, J.A. concluded that there never was in existence a valid agreement for sale in writing between Deniau and Cadieux because Deniau, the nominal purchaser, was designated as "Deniau or nominee" in the offer to purchase.[13] Thus, the relevant accepted offer to purchase was held to be void for uncertainty. In support of this finding, O'Sullivan, J.A. made note of the Supreme Court of Canada decision in *Causeway Shopping Centre Ltd.* v. *Muise*.[14] It should be noted that in the *Muise* decision that although a lease was held invalid by the Supreme Court of Canada by virtue of the lessee being described as "Muise or his Nominee", Muise's nominee, namely, Olympic, actually went into possession under the lease in question and paid rent for a time. No formal assignment of the lease was entered into between Muise and Olympic. Post facto, the entire transaction was declared void for uncertainty. In *Westward Farms,* the accepted offer to purchase was declared void for uncertainty *ab initio*. The plaintiff, Westward, never did have the opportunity to enter into possession, or become the registered owner of land. O'Sullivan, J.A. did point out that:

> It is common practice for a purchaser to stipulate that he will have the right to take a transfer in the name of himself or his nominee. There is no uncertainty of parties in such a case. But in the case before us, the purchaser himself is described as "Deniau or nominee."[15]

He went on further to state:

> Had Deniau been sued on the agreement,he could well say he was only one of a number of alternative purchasers. It was impossible to determine at the time when the agreement was made or when the amendment was made who the nominee of the group was or would be. In fact, in a number of concurrent agreements with other farmers, the nominee chosen was a company not even in existence at the time the agreements were signed.
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> Under the circumstances, I have no hesitation in saying that the agreement in writing was void for uncertainty.[16]

There is a dearth of Canadian jurisprudence on this particular point. However, the New Zealand High Court recently decided to the contrary in the case of *Power* v. *Nathan*.[17] In *Power* v. *Nathan*, one Langford offered to

13. *Supra* n. 1, at 21 *et seq*.
14. (1968), 70 D.L.R. (2d) 720 (S.C.C.) (hereinafter referred to as *Muise*).
15. *Supra* n. 1, at 21.
16. *Supra* n. 1, at 22.
17. [1981] 2 N.Z.L.R. 403 (H.C.).

purchase Power's farm property. On the written form after Langford's name and description there were written the words "or (?)/as nominee".[18] As Langford already owned farm land he could not make the express declaration required for the aggregation of farm lands purchased pursuant to Section 24 of the New Zealand *Land Settlement Promotion and Land Acquisition Act (1952)*.[19] Langford was a client of Nathan's accountancy practice. The agreement for sale and purchase was altered by the deletion of the words describing the purchaser and substituting the words "Peter Nathan of Auckland, chartered accountant, trustee for a company to be formed." Langford's signature was deleted and the signature of Nathan appeared instead. There were no special provisions in the agreement signed by Nathan for the entering into of the new agreement by the company as soon as it was formed. The company was subsequently incorporated and the required declaration under Section 24 of *Land Settlement Promotion and Land Acquisition Act (1952)* was completed, forwarded to the plaintiff's solicitor, and duly filed in the land transfer office. Some eight days after incorporation, Langford's solicitors wrote to the plaintiff's solicitors confirming that all rights previously held by Nathan had passed to the company and that the company was bound by the agreement. Unfortunately the company was unable to arrange financing to complete the transaction on the prescribed adjustment and possession date. Hence Power resold the property and sued Nathan for the losses he had suffered.

Vautier, J. applied, *inter alia*, the earlier New Zealand decision of *Lambly* v. *Silk Pemberton Ltd.*[20] and held Nathan the nominal purchaser to be liable for damages for breach of contract.*Lambly* v. *Silk Pemberton Ltd.* was a case where the purchaser was described in the offer to purchase as *"Nigel Pemberton of Auckland or his nominee or nominees"*.[21] Prior to the adjustment and possession date Pemberton notified Mrs. Lambly, the vendor, that he had nominated Silk Pemberton Ltd. as the purchaser. By that time Mrs. Lambly had made it clear that she did not intend to carry out the agreement in any event, so the question arose as to her having in fact accepted Silk Pemberton Ltd. as the purchaser in place of Mr. Pemberton. The New Zealand Court of Appeal held that Silk Pemberton Ltd. had no contractual relationship with Mrs. Lambly. Nevertheless, this finding did not have the result of releasing Mr. Pemberton, the nominal purchaser, from contractual liability. In *Lambly* v. *Silk Pemberton* the New Zealand Court of Appeal also referred[22] to the Supreme Court of Canada decision of *Muise*[23] but distinguished that particular decision on the grounds that the parties in *Muise* were not *ad idem*. Hence, the ultimate finding in *Lambly* v. *Silk Pemberton*, as in *Power* v. *Nathan* was to the effect that the agreements in contention certainly were not void for uncertainty.[24]

18. *Id.*, at 405.
19. *Ibid.*
20. [1976] 2 N.Z.L.R. 427 (C.A.).
21. *Id.*, at 429.
22. *Id.*, at 431.
23. *Supra* n. 14.
24. *Supra* n. 20, at 431.

In both *Power* v. *Nathan* and *Lambly* v. *Silk Pemberton Ltd.* the New Zealand Courts concluded that there was no novation wherein a new contract was concluded, substituting the liability of the nominee for that of the nominal purchaser. As Vautier, J. stated in *Power* v. *Nathan* :

> It is of course in most cases of sale of land quite immaterial to the vendor into whose name the transfer is made. So long as he receives the stipulated purchase price that satisfies his interest in the matter. The solicitors acting for the first defendant and Mr. Langford place great stress upon the fact that the plaintiff's solicitors interested themselves in the progress made in regard to the incorporation of the company, the lodging of the statutory declaration on behalf of the company and other steps taken with a view to the company becoming the registered proprietor of the land. I do not feel able to accept the submission that these matters provided evidence of a novation such as is contended arose. They are all simply consistent with the belief of the solicitors on both sides that the transfer would be effected to the company when settlement was completed. The acceptance of this clearly does not in any way involve in itself the necessity for concluding that a new contract was brought into existence whereunder the first defendant was released from liability under the contract and the liability of the company substituted. This is made clear in the judgments in *Lambly* v. *Silk Pemberton Ltd.*....to which I have already referred.[25]

In a case comment[26] on the trial decision of *Lambly* v. *Silk Pemberton Ltd.* Professor David Vaber states:

> But, assuming there to be sufficient certainty, is it reasonable to assume the vendor intended that the effect of a nomination would be that the original purchaser was thereupon freed of all his obligations under the contract which were thenceforth assumed by the nominated party? With respect, this is hardly reasonable and "the more unreasonable the result the more unlikely it is that the parties can have intended it" (*Schuler* v. *Wickman* [1973] 2 W.L.R. 683, 689 E.F., per Lord Reid). Such a construction would mean that a purchaser could wriggle out of an agreement by nominating a paper company, a minor, a lunatic or a man of straw against whom the vendor could have no practical remedy. The vendor may have relied on the credit of the purchaser, especially if the agreement is a long term agreement for sale and purchaser or where (as here) the deposit was small. The matter cannot be cured by saying that a bona fide nomination must be made before it can properly be called a "nomination" under the contract, for the purchaser may bona fide, but mistakenly, believe in the creditworthiness of his nominee and the vendor is still faced with the same problem. There is further some authority that the holder of an option need not consider the interests or convenience of the optionee but solely his own advantage (*Reardon Smith Line Ltd.* v. *Ministry of Agriculture* [1963] 1 All E.R. 545, 560 A.B., per Lord Devlin). It is submitted that, if a meaning must be given to the phrase, it should be one which ensures that the original party continues to be liable to the vendor; in effect that the vendor is no worse off than if there had been an assignment of the purchaser's rights (but of course not his obligations) under the agreement.[27]

With all due respect to the Manitoba Court of Appeal, it is submitted that the New Zealand Courts have followed the more reasonable course of action, and that which is most compatible with modern conveyancing practice. Surely, it could have been held in *Westward Farms* that Deniau, as a designated purchaser, was liable to Mr. Cadieux under the relevant offer to purchase. Hence, there could be no uncertainty as the purchaser under the agreement could be readily identified and subsequently sued, if necessary. If Deniau so desired, he, or indeed any other purchaser exercising his inherent right of

25. *Supra* n. 17, at 414-15.

26. "Sale of land to purchaser or his nominee", [1974] N.Z.L.J. 531.

27. *Id.*, at 532.

nomination under a contractual arrangement, (unless such right of nomination was expressly precluded by the terms of the agreement), could claim indemnification or contribution from their nominees or any other interested parties by way of third party proceedings. This is exactly what was done in *Power* v. *Nathan*. Unfortunately, the law in this regard is now in an undesirable state of flux in Manitoba.

Conclusions

As regards obtaining the necessary consent to disposition of the homestead, the prudent course of conduct for Manitoba real estate agents and solicitors would be to obtain a specific Dower Act consent to acceptance, and certificate of acknowledgement by the wife to such consent as is presently provided for in both the standard residential and "I.C.I." real estate board offer to purchase forms. This, undoubtedly, in many instances will impose a great inconvenience, particularly upon agents working in the field, but to do otherwise would have the unfortunate result of leaving many validly accepted offers to purchase open to attack in the future.

The payment of "bird dog" fees is specifically proscribed by *The Real Estate Broker's Act of Manitoba*. Any real estate firm engaging in this practice in Manitoba apparently does so at its own peril, and at the peril of the parties with whom an agency agreement was entered into.

The problem of contractual "true conditions precedent" appears to be amply met by the inclusion of this specific waiver provision which is now incorporated in both the standard residential and "I.C.I." forms of the Manitoba Real Estate Association: "All conditions to which this offer is subject are, unless otherwise expressly stated, for the benefit of the purchaser alone and may be waived by me/us". It is standard real estate practice for purchasers to waive conditions precedent that have been inserted on their behalf. Indeed, the normal practice of real estate could not be carried on if this were not the case. Fortunately, in the past, Canadian courts adopted the rather sensible practice of ignoring the possible ramifications of *Barnett* v. *Harrison* and *Turney* v. *Zhilka*. Unfortunately, these principles were not ignored in the *Westward Farms* case, and the full majesty of the law relating to conditions precedent was invoked. As the standard real estate board forms have now been amended in this regard (supra), hopefully,*Barnett* v. *Harrison* and *Turney* v. *Zhilka*. will now be laid quietly to rest in Manitoba.

As regards contractual uncertainty by designating a prospective purchaser as "x or his nominee", the prudent course of conduct, at least for the time being, in Manitoba, would be to insert into the offer to purchase terminology to the effect that registerable title or transfer to the land in question may be taken in favour of either the specifically designated purchaser or their nominee or nominees. Until such time as the Manitoba law is changed regarding the designation of the purchaser, one can only take heed of the old common law maxim of *Caveat Emptor*, Caveat Real Estate Agents and Caveat Real Estate Solicitors.