

While the above are but a few of the approximately two hundred and forty incidents reported since July 1, 1990, it will give you the flavour of the types of claim which might not otherwise come to light except during recessionary times.

Claims Wise No. 9: Preserving Easements

Recessions invariably produce a high incidence of professional liability insurance claims, particularly in the real estate field. We have seen a steady flow of claims of late which commonly arise out of imperfections in security instruments or failure to ensure that security instruments attain the necessary priority between encumbrancers. The commission of such mistakes will sometimes go undetected in non-recessionary times because security instruments more often are retired and less often have to be enforced. When they do have to be enforced, as is more prevalent in recessionary times, otherwise latent professional errors inevitably become exposed.

There have been a couple of recent claims with a little different twist from the more common claims above noted. These can generally be described as situations where lawyers who, after being retained to procure and record an easement in their clients' favour, have done so without first obtaining the consent or a postponement agreement from a prior mortgagee of the land to which the easement pertains.

An illustrative example is a claim file in which a lawyer, on the client's instructions, prepared and recorded a right-of-way which permitted the use of a driveway and parking area in a residential setting. The lawyer did not obtain the consent or a postponement agreement from the prior mortgagee of the neighbour's land. Once the easement was in place, the client expended a considerable amount of money in resurfacing the driveway and parking area, which the easement permitted the client to do.

The misfortune struck later when the neighbour defaulted on his mortgage and it was foreclosed upon. The result of the foreclosure, of course, was the extinguishment of the easement which made for a very unhappy client. Needless to say, a claim was made against the insured lawyer.

Without the recession, there is a good chance that the mortgage would eventually have been paid out and the professional error thereby neutralized. In any event, the example serves as a reminder that in creating any proprietary interest in land, lawyers must be alert to the consequences if there should happen to be a foreclosure by a prior mortgagee.

Claims Wise No. 10: Practicing out of the Jurisdiction

A lawyer was retained by a client for whom he performed other services with respect to a motor vehicle claim arising out of an accident which occurred in New Brunswick. The lawyer sought instructions and corresponded with the insurers but failed to commence an action. In recent years in Nova Scotia, the Courts have been quite lenient in waiving the provisions of the *Limitation of Actions Act*. Not so elsewhere. In the Province of New Brunswick, there is no such provision within their Rules or legislation and the failure to commence the action in this case has proven to be fatal. The time delay was only a few months.

Claims Wise No. 11: Securities Act

The *Securities Act* can apply to a simple transaction involving the purchase and sale of a company. The Act and the regulations are not simple and practitioners are cautioned to familiarize themselves with the Act at any time when they are involved in the purchase or sale of shares. A recent claim involved a practitioner who received instructions to incorporate a company and to issue shares to a series of stated individuals. The lawyer did not inquire nor was he made aware of the fact that the parties instructing him had been out openly soliciting the subscription for shares. The solicitation clearly violated the provisions of the *Securities Act*. Fortunately for us, there were other matters out of sorts and the claim did not develop. The *Securities Act* and the regulations thereunder are very complex and can apply to even the simplest share transaction. Practitioners should keep the Act in mind whenever shares are being issued or transferred.

did not disclose this error to the lawyer and the client who is now in receivership and bankruptcy is not in a position to repay that amount and, if the sale proceeds from the foreclosure of the property are not sufficient to pay out two mortgages, there will be a loss.

Both errors occurred understandably, but nonetheless, through failure to properly prepare and attend to a Statement of Adjustments.

Claims Wise No. 5: Postponement Agreement

It is discovered at the time of Foreclosure that a mortgage has other charges or encumbrances in priority to it which, in two incidents, resulted from re-financing without obtaining proper postponement documentation. In one recently reported incident a lawyer discussed the possibility of postponing a second Vendor take-back mortgage in order to permit the client to re-finance the existing first mortgage and then proceeded to carry through with the re-financing and record the release for the original first mortgage without ever obtaining a postponement agreement. As a result the Vendor take-back mortgage becomes a first charge.

Claims Wise No. 6: Deeding Equity to Mortgagee

In an effort to save the embarrassment of going through a Foreclosure, a mortgagee agreed to take a Quit Claim Deed from a mortgagor which in turn would permit the mortgagee to sell the property and forego the necessity to foreclose and incur the necessary expense to do so. The lawyer acting for the mortgagee not only obtained and recorded the Quit Claim Deed but also had the mortgagee sign a release of its mortgage and recorded the release at the Registry of Deeds. When it was subsequently discovered on the sale of the house that a Judgement had been recorded after the initial mortgage was granted but before the Quit Claim Deed was granted by the Mortgagor it became necessary to pay out the Judgement in order that the sale could proceed. Obviously if the mortgagor is suffering from financial difficulties to the extent that he or she is

giving up their home to the mortgagee, one must be mindful that other debts are likely going unpaid and will shortly give rise to Judgements. One might also consider not recording the release under similar circumstances until the time of closing which may well, notwithstanding the doctrine of merger, preserve the mortgagee's priority if necessary.

Claims Wise No. 7: Guardians/Mortgages

In two separate instances reported recently, mortgages were signed by individuals in the capacity as guardians for the owner or owners of the property being charged by the mortgage without any proper authorization or appointment. In one instance the guardians appeared to be acting on behalf of an infant who owned the real estate and in the second instance the parties were acting on behalf of an incompetent adult person. In neither case were there proper applications made to a court nor is any documentation available to support the guardianship appointment.

Claims Wise No. 8: Sales Tax Clearances

During hard times, so-called, many businesses neglect to pay their ongoing business obligations and in particular various and sundry taxes. While many practitioners recognize the need to obtain a clearance certificate from the Provincial Tax Commission, it is often difficult in the shortness of time to put off a closing pending the receipt of such a clearance. Many practitioners believe that the Purchaser of such a business is protected by withholding a certain percentage of the inventory value on the understanding that the Purchaser's liability for payment of tax in connection therewith would not exceed that amount. Unfortunately, the legislation providing for the payment of Health Services Tax appears to be wide enough so as to require an unsuspecting purchaser to pay not only tax on the inventory which he is purchasing but can include all unpaid taxes for previous reporting periods. If a client insists on closing before the Clearance Certificate is to be a written acknowledgement from the client to the practitioner accepting the risks involved. See Department of Finance Bulletin 63-88.