

WHEN OPPORTUNITY KNOCKS

Real estate “bargains” attract claims.

In these sobering economic times it is worth considering some of the professional liability risks generated by disappointing outcomes in the real estate market. When parties' expectations are not met, they are often inclined to blame the legal advisers associated with the transaction.

The impulse purchase

One costly claim at LPLC arose from a purchase at auction, subsequently regretted by the client. The lawyer was asked to attend an auction at short notice with his developer client. In this case, his rather casual approach to the “Saturday retainer” left him exposed to a substantial claim.

The site which formed the basis of the dispute was a former service station which the client intended to develop. Why exactly was the lawyer at the auction? In the client's mind, his lawyer was there to protect his interests, to warn him of any unnecessary risks in the contract.

The client purchased the property for what he considered to be a good price, until it emerged that huge costs were required to remediate the contaminated site. With these costs, it was not quite the bargain anticipated by the developer. The sale contract in fact limited the vendor's liability in relation to pollution of the site and the lawyer was attacked for failing to warn the client about this limitation.

Since the retainer was never clearly defined, it was open to the client to argue that the lawyer had given inadequate pre-contractual advice on the auction day. The lawyer's poor recollection of what was said and done that day did not assist LPLC's defence of the claim.

The client at auction appeared enthusiastic about the site's development potential and was therefore more likely to be filtering information about commercial and legal risks. The lawyer did nothing to moderate those expectations and without providing adequate pre-contractual advice, exposed himself to a claim.

Solicitor purchase

The prospect of a real estate “bargain” underscored another recent claim seen at LPLC.

The allegation concerned the purchase of property by an employee solicitor of the firm acting as solicitors for the mortgagee in possession.

The firm was instructed by a building society to take possession of a property against a mortgagor in default. The property was an unusual three-bedroom apartment in a blue chip suburb. The lawyer handling the proceedings to get the mortgagee into possession had been looking to buy in the area. He made an offer to the real estate agents to purchase it for \$360,000 soon after the agents were engaged but before it was advertised. The agents eventually accepted this offer after satisfying themselves that they had tested the market and failed to generate any interest in the property. It sold two weeks before auction for \$20,000 more than the owner had paid for it two years earlier. The ex-owner was unhappy with the result.

The *Transfer of Land Act 1958* (Vic), s77 sets out the duties of the mortgagee in possession.

obtained clearance from partners at the firm to proceed and formed the view that it was ethically appropriate, providing he was not placing his interests ahead of the client. But the issue is murky in view of the statutory duties imposed on mortgagees in possession and even as a matter of good client relations. In this case, a disappointing outcome for the ex-owner assumed a more sinister perspective, given that the property was sold at the lower end of the range of values, before auction and to a lawyer who got the mortgagee into possession. This trio of facts contributed to the ex-owner's perception of impropriety.

A more cautious approach would have focused on the perception created by the lawyer purchasing the property before auction. Prudent practice is not just about skirting around technical breaches of the law; the principles of professional conduct require lawyers to ensure that justice is seen to be done.

The allure of a real estate “bargain” may tempt clients and even their lawyers to stray into the territory of high-risk behaviour. The lesson is to tread warily when the “not to be missed” real estate opportunity presents itself.

In effect, it requires the mortgagee to take reasonable steps to ensure the best available price for the mortgaged property. In this case, the ex-owner issued proceedings, claiming that the lawyer had colluded with the building society to purchase the property at less than market value, in breach of s77. The trial judge found on balance that the advertising and the price obtained were sufficient to reject the claim of underselling. Although the action settled against the lawyer on the third day of trial, the lawyer's conduct raises interesting risk management issues.

The lawyer had been involved in securing possession of the property for the mortgagee client but had no involvement in the firm's handling of the sale of the property. He had

Lessons

The allure of a real estate “bargain” may tempt clients and even their lawyers to stray into the territory of high-risk behaviour. The lesson is to tread warily when the “not to be missed” real estate opportunity presents itself.

Lawyers who opt to attend auctions with clients put themselves in an invidious position. When briefed on short notice, they are not placed to offer adequate pre-contractual advice and so expose themselves unnecessarily to the risk of a claim. ●

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