

MORTGAGE FRAUD REVISITED

Practitioners are reminded to be vigilant in mortgage-related matters.

In this column in May 2007 we noted a rising incidence of mortgage fraud perpetrated on family members – see “All in the family” (2007) 81(5) *LIJ* 78. This often involved a person defrauding their unsuspecting spouse or an elderly relative holding an unencumbered title.

What has changed since then? Not much. Four years later, the Legal Practitioners’ Liability Committee (LPLC) continues to see these types of claims.

Old acquaintances

A practitioner recounted a recent episode involving a married couple for whom he had acted on different matters over several years. He had been asked by the husband to witness a mortgage over the couple’s home. When the papers were to be signed, the husband arrived at the practitioner’s office alone. He explained that his wife was feeling too ill to accompany him and was unable to receive visitors, but that she had signed the documents just before

to forge the signatures of both his wife and the practitioner on the mortgage.

By refusing to “witness” the wife’s signature, the practitioner saved himself considerable cost and angst, especially as clause 15 of LPLC’s policy requires indemnity back for purporting to witness the execution of a document without seeing the actual execution or knowingly making a false representation in a solicitor’s certificate or any other document.

Other warning signs

In our previous article we noted that mortgage and conveyancing work is largely process-driven, but urged practitioners not to lose sight of the entire transaction when completing its various steps. Practitioners can then be better placed to pick up tell-tale signs indicating possible problem mortgage transactions, such as:

- a party not identified to the practitioner;
- a lost or reissued certificate of title;
- obvious disparity between those receiving the benefit and those taking the risk;

had been provided by a practitioner from another firm.

Just before settlement was due, the experienced clerk handling the matter for the lenders was contacted by one of the borrowers who said the certificate of title had been lost and inquired whether the loan money could be advanced notwithstanding. A letter from the borrowers’ solicitors confirmed they had been instructed to apply for a new certificate of title.

The clerk advised the lenders that if they wanted to proceed with the loan on the due date a statutory declaration could be obtained from the borrowers and a caveat lodged pending the issuing of a new title.

The money was subsequently advanced and appeared to have been misappropriated by the individual borrower. The lenders sued the company borrower and its directors on the loan agreement and guarantees respectively. The company and its directors defended the proceedings on the basis that execution of those documents was forged and they had not received the loan money.

The lenders also alleged the firm failed to advise them not to advance the money without production of a certificate of title that enabled registration of the mortgage.

As is often the case in these matters, there may have been some doubt as to whether the practitioner providing the solicitor’s certificate took adequate steps to identify the persons to whom the certificate was provided. The practitioner maintained that he did see the people sign the relevant documents and that they produced ID. Some of that ID may well have been false.

Lessons

Little has changed since our previous article. In respect of some claims there is a strong argument that the fraud involved an intervening act sufficient to distance the practitioner from liability. However, there is always the risk that any shortcomings in a practitioner’s work can help facilitate a fraud, as well as open the possibility of establishing a causal link with the ultimate loss. ●

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he left. The husband asked the practitioner to “witness” both signatures.

The practitioner told us he had come to know the couple reasonably well and, although he knew it would be wrong to “witness” the mortgage in the circumstances, he almost put pen to paper. He was not aware of any disharmony between the husband and the wife and previously had no occasion to doubt the husband’s honesty. However, the practitioner said that his risk management instincts kicked in (not to mention observance of professional obligations) and he declined to attest to the wife’s signature in what was possibly a rather awkward moment.

Months later the practitioner received a call from the bewildered wife asking about a mortgage in her name which appeared to have been witnessed by the practitioner. It transpired that the husband had proceeded

- doubt over the borrower’s capacity to repay the debt;
- use of a power of attorney; or
- finance brokers and other intermediaries, often involved in short-term refinancing transactions (in some cases brokers have participated in the fraudulent activity). Consider the following example.

A firm acted for private lenders, who were longstanding clients, on a short-term loan to a company and an individual. It was agreed that the loan was to be secured by a mortgage registered over a property owned by the company, supported by guarantees from its directors. The individual gave no security.

A loan agreement, guarantee and mortgage were duly prepared by the firm and sent to the borrowers for execution. When returned to the firm the documents appeared to have been duly executed. A solicitor’s certificate

This column is provided by the Legal Practitioners’ Liability Committee. For further information ph 9672 3800 or visit www.lplc.com.au.