

BE SECURE WHEN ADVISING LENDERS

Making assumptions about your retainer with longstanding lender clients is risky.

TIPS

- Think about how the matter is different from previous matters.
- Record the scope of your retainer in writing.
- Do not treat private lenders or longstanding clients with undue informality.
- Supervise staff appropriately.

In 2017-18 mortgage matters accounted for 19 per cent of the Legal Practitioners' Liability Committee's (LPLC) total claims cost. Most of that cost was attributable to practitioners failing to ensure the lender client had adequate security.

These mistakes are sometimes made by practitioners acting for private lenders who they know well. They take an informal approach, assume the lender knows and understands the risk they are taking, and fail to give clear, written advice.

In other cases, the practitioner assumes they are just documenting the deal and are not retained to investigate the parties, conduct searches or advise on the adequacy of security. However, they fail to confirm their retainer in writing.

Wrong assumptions

In one claim, the practitioner drew documentation and provided legal advice to lenders referred to him by a finance broker. The broker usually undertook due diligence and provided lender clients with the application, bank statements and a rates certificate regarding the property's value.

The broker emailed the practitioner advising that a loan for \$120,000 needed to be settled "ASAP" for a longstanding lender client. The borrower was a company with the loan to be secured by a second mortgage over the home of a director. Unlike previous transactions, the broker did not conduct the usual due diligence.

The practitioner's law clerk had the day-to-day conduct of the matter. Her title search revealed that a bank had a first mortgage over the director's property.



The broker advised the property was worth more than \$1 million and provided the practitioner with two bank statements from two mortgage accounts that collectively indicated debts of around \$450,000. The clerk assumed the amount secured by the first mortgage was only about \$450,000 and concluded there was ample security for the client's proposed loan. Consequently, she did not investigate the bank loan, obtain a valuation of the property or advise the client that they should do so.

The clerk told the bank of the proposed second mortgage and asked whether a deed of priority was required because she thought this was the bank's standard practice. The bank did not respond but the loan went ahead and the mortgage was prepared for registration. A copy was sent to the bank which then made the title available and settlement occurred in accordance with s86 of the *Transfer of Land Act 1958* (Vic).

The director was later declared bankrupt and the borrower company went into liquidation. The bank's first mortgage was an all-monies mortgage and the total amount owed to the bank exceeded the property's market value.

The lender client claimed the firm failed to undertake adequate due diligence and the advice to proceed with the loan was negligent. The practitioner and his clerk were not accustomed to investigating security and first mortgages because that was usually undertaken by the broker. The firm's retainer with this longstanding client was not adequately defined. It needed to be confined to just documenting the deal with an explanation about the risks of not obtaining full advice on the transaction. The manner in which the referrals occurred and the existing relationship with the client resulted in the firm adopting a casual approach to their engagement management.

Coupled with that, the practitioner failed to adequately supervise their clerk. It is not enough to leave your capable clerk to manage these matters and expect them to come to you with a problem. People don't always know when they have a problem because they often treat each matter as if it is just like the last one and fail to recognise when it isn't. ■

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