

PRIVATE LENDING PITFALLS

Acting for a private lender can be high risk.

TIPS

The LPLC recommends the following:

- Don't dabble if this is not an area you act in regularly.
- Only act for one party.
- Advise your lender client about security for the loan.

The LPLC regularly receives claims where a practitioner is acting for a private lender. This can be a high risk area for a number of reasons.

Firms that don't undertake a lot of lending work usually do not have established processes for dealing with loan transactions and a good set of precedents.

The clients are often unsophisticated, for example parents providing a loan to a child to assist with the purchase of real estate – usually the child's first home.

In some instances the firm acts for both the borrower and lender because they are both established clients of the firm. Sometimes one client is a property developer and the firm introduces another client to assist with finance for the development costs.

The borrowers may have limited language skills.

The transactions are sometimes entered into by an attorney on behalf of a borrower/mortgagor.

In one claim a practitioner was instructed to prepare a loan agreement as evidence of an advance of funds which had already been made. He had a number of files involving both the lender and borrower.

The practitioner pointed out to the parties that there might be a conflict in acting for both of them but no objection was received so he continued to act. The practitioner went on to witness the signing of the loan agreement by all parties. The loan agreement was a

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precedent used by the firm and allowed the lender to lodge a caveat over land owned by the borrower. In this claim no caveat was ever lodged.

After a dispute arose between the parties, the lender queried why the practitioner had not lodged a caveat or recommended the loan be secured by a registered mortgage over land owned by the borrower.

The practitioner said he did not lodge a caveat as he was instructed that to do so would affect the borrower's ability to deal with the land. He also understood that the loan was otherwise unsecured as the advance would be satisfied shortly by the transfer to the lender of a half share in a business owned by the borrower. This was not mentioned in the loan agreement.

Ultimately the matter settled with no payout to the claimant because the advance had already been made before the loan agreement was signed so the lender could not be any worse off. However, this is a good example of the problems of acting for both parties when all they want you to do is document the deal and appear to be in heated agreement.

The LPLC recommends the following:

- Don't dabble if this is not an area you act in regularly.
- Only act for one party.
- Advise your lender client about security for the loan.
- Confirm advice to the lender in writing.
- Ensure mortgagee clients provide a signed client authorisation form where any mortgage is to be lodged for registration electronically. The client authorisation form is contained in schedule 4 of the participation rules. See also the MPR Guidance Note #1 Client Authorisation issued by the Australian Registrars' National Electronic Conveyancing Council (ARNECC).
- Ensure mortgagee clients are advised of the need to verify the authority and identity of any mortgagor in accordance with s87A and s87B of the *Transfer of Land Act 1958* (Vic). At present, in order to comply the mortgagee must follow the requirements set out in the participation rules within the meaning of the Electronic Conveyancing National Law (Victoria). The LPLC understands that Land Registry is currently drafting verification of identity and authority guidelines in accordance with s87(2)(a) and they will be available in the last quarter of 2015. See also the MPR Guidance Note #2 Verification of Identity issued by ARNECC.
- Warn mortgagee clients that failure to comply with s87A and/or s87B of the *Transfer of Land Act 1958* (Vic) will mean the Registrar of Titles may refuse registration or remove the mortgage from the register.
- Ensure solicitor's certificates to be provided by any borrower, mortgagor and/or guarantor are in accordance with r11 of the *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015*. Rule 11 prescribes the use of certificates of advice in the form issued by the LIV.
- Ensure any title(s) required are received at settlement.
- Where any prior mortgagees are to remain on title ensure the nomination request form is provided to the Land Registry before funds are advanced.
- If instructed to proceed to settlement by the lender where there is the possibility of any delay in registering the mortgage, give the lender written advice of the risks of proceeding without adequate security and seek instructions to lodge a caveat.

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