

SOLICITOR'S CERTIFICATE BASICS

Practitioners must be aware of key risk management measures when they advise security provider clients.

Some practitioners are surprised that the LPLC continues to receive Amadio-type claims. These typically concern advice from a practitioner to a security provider which is subsequently disputed or an allegation from an unrepresented security provider that the practitioner owed them duties. A variation on that theme is the de facto Amadio-type claims where the elderly client not only provides the security for the loan but is the borrower as well. The funds are then gifted or "lent" to the elderly client's child, usually for their business. It is essential practitioners are aware of key risk management measures when they advise security provider clients, even where they are de facto borrowers.

Acting for borrower and guarantor

In one claim, a practitioner met with a woman and her son regarding a loan agreement. Under the agreement the woman was to borrow money at very high interest rates with her home provided as security. The practitioner said he gave advice to the woman on the loan in the presence of her son who acted as interpreter. The son was also the guarantor of the loan. The practitioner witnessed the signatures of both mother and son and took no notes of the meeting. The funds were borrowed for the benefit of her son although the practitioner did not know that at the time because he did not ask. When the woman failed to repay the loan, the lender sought to enforce its security and sell her home.

The mother later claimed she was under a disability, had a poor grasp of English and did not understand that she was the borrower and mortgaging her home.

She alleged the practitioner represented both her and her son and failed to protect her interests. The practitioner thought he was only acting for the mother but there was no documented retainer clarifying who was the client. The son was not an independent interpreter and the practitioner had no record of what the son told his mother at the meeting. There was also no record of the practitioner's advice. The practitioner did not fully understand the Amadio issues and had received insufficient training on how to manage the risks.

The de facto security provider – the borrower

Another claim involved a variation on this scenario. An elderly couple entered into a loan agreement and mortgaged their property to obtain money for the benefit of their son. The documents were signed at

the premises of a finance broker.

The practitioner said he was called to the broker's premises for a meeting with the borrowers. During the meeting that was said to have taken around 20 minutes and was conducted entirely in English, the borrowers said little and asked no questions. At the end of the meeting they signed the loan agreement and mortgage.

When the lender sued the borrowers for repayment of the loan and possession of the property, the borrowers claimed their English was limited and they did not have the capacity to read and understand the relevant documents. They said they had no recollection of meeting the practitioner.

The practitioner had no record of his advice or details of the meeting either and said his usual practice was not to open a file for these types of meetings. He would simply explain the documents to the client and issue an invoice.

File notes

The importance of file notes was demonstrated in *Bakovski v Lenehan* [2014] NSWSC 671.

File notes are a note to the file, not a note to you and should record:

- who was present
- a summary of questions asked and the client's answers
- the advice given
- how the client's understanding of the advice was tested
- how long the conference took.

TIPS

- Do not act for both the borrower and guarantor.
- Ask why your clients are borrowing the money or providing security.
- Ensure staff receive adequate training.
- Use a professional interpreter where appropriate.
- Record advice, details of the conference and any translation in writing.

Ask why

Ask borrowers and guarantors why they are putting their assets at risk. Cases such as *Provident Capital Ltd v Papa* [2013] NSWCA 36 highlight when practitioners are under a duty to draw the client's attention to the risks in borrowing the money and the need to obtain independent financial advice.

Confirm identity

Caution is required, especially when advising and providing a solicitor's certificate to walk-in clients. In *XPAK Pty Ltd v Scibilia & Ors* [2013] VCC 1260, a man and a woman claiming to be a married couple approached a firm

for a solicitor's certificate. The signature of the man's wife on loan documents was forged and the man's companion was an imposter.

When the woman was unable to produce identification on request the practitioner completed the advice and solicitor's certificate but held it pending the identification being produced. The man later returned alone with his real wife's identification and the firm provided the solicitor's certificate, inadvertently facilitating the fraud.

See the Key Risk Checklist: Solicitor's certificates for borrowers or surety providers at www.lplc.com.au/category/checklists/. ■

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