

When the stake is at stake

GOOD SYSTEMS AND CHECKLISTS TO ENSURE COMPLIANCE WITH THE PROCEDURAL ASPECTS OF CONVEYANCING ARE IMPORTANT PREVENTATIVE ASPECTS OF RISK MANAGEMENT. STAKEHOLDING IS A GOOD EXAMPLE OF WHEN DIFFICULT SITUATIONS MAY ARISE. BY HILARY STOKES

Stakeholding is an area which leads to claims when practitioners are caught up in a dispute as to whom and when the money (ie, the stake) should be paid out. Broadly speaking there are two types of stakeholding. The first is when there is no wider retainer and the whole role of the solicitor is to act as stakeholder; the second is where the solicitor holds the stake as part of a broader retainer, most commonly the deposit held in a conveyancing transaction. In either case, the solicitor ought never become the arbiter of a dispute between the parties as to whom and when the stake should be paid.

As a matter of risk management and because there is often no benefit for the practitioner, it is generally recommended that practitioners avoid acting as stakeholder when that is the sole role. However, if in that position and to avoid dispute, the solicitor ought to clearly communicate to the parties in writing at the outset in particular, the terms upon which:

- (a) the stake will be held. A term to the effect that the solicitor holds no interest in the stake may be prudent so the solicitor may make application to the Court by way of stakeholder interpleader if necessary. The interpleader applicant must be neutral in having no claim on the stake, except for charges or costs: r 12.10(1) *Supreme Court (General Civil Procedure) Rules 2015*
- (b) the funds will be released, being either mutual written consent by the parties or court order.

If the conditions are not met solicitors are commonly subject to, and ought to resist, pressure from one of the parties to release the stake. Instead, and subject to the terms already agreed, a solicitor may enter into a new stake as to the sum disputed on terms expressed in (b) above, or file a stakeholder interpleader summons with the Court. The stakeholder interpleader application provides for the parties to the dispute to argue the issues, not the solicitor, and the Court determines which party is entitled to the stake.

In conveyancing transactions, stakeholding disputes can arise when the contract of sale is not completed and both purchaser and vendor claim entitlement to the deposit. For example, the vendor alleges the purchaser defaulted by failing to pay

the contract price, entitling the vendor to forfeit the deposit held, and the purchaser alleges the vendor produced an inadequate or wrong vendor's statement, entitling the purchaser to rescind the contract and recover the deposit paid.

To the extent the deposit is being held by the vendor's solicitor, a conflict arises between duties to the vendor as the client and duties to vendor and purchaser as contingent beneficiaries of the stake. It is a dangerous position for the solicitor to determine entitlement to the stake – if the solicitor pays the deposit out to one claimant without resolution of the dispute, the solicitor is inevitably joined as a party to a future proceeding brought by the other party claiming entitlement to the deposit. Payment by the solicitor of the deposit to the party ultimately found not to be entitled to the funds is the foundation for a claim against the solicitor in negligence. The deposit monies may disappear, for example when the recipient is insolvent, and the solicitor's conduct is the cause of the loss.

If a dispute as to the deposit arises, a prudent course of action for a solicitor is:

- if appropriate, seek agreement between vendor and purchaser that the deposit be held pending ventilation of their dispute and that it be released only in accordance with an agreed (in writing) outcome or court order
- if no such agreement is reached, the solicitor should immediately make application to the court for an order that the money be paid into court while the vendor and purchaser litigate their dispute. The solicitor is saved the costs of participating in any future proceeding, and is entitled to seek an indemnity in respect of the costs of the interpleader application, and
- to preserve neutrality, the solicitor ought not make any claim on the deposit for costs or otherwise. A conservative approach avoids the risk the stakeholder interpleader application may fail, creating a three-way dispute. ■

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SNAPSHOT

- A solicitor ought never become the arbiter of a dispute between parties as to whom and when the stake should be paid.
- Do not release the stake without written consent from both parties or a court order.
- If agreement cannot be reached, use the stakeholder interpleader summons r 12.02 *Supreme Court (General Civil Procedure) Rules 2015*.

