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## Always follow the proper instructions

- Grant Feary, Deputy Director, Law Claims

Be especially careful to clarify and confirm your instructions with your actual client: not just through an intermediary.

**Q: What's the different between legal practice and building flat-pack furniture?**

**A: Not very much – you should always follow proper instructions.**

It is common for solicitors to be instructed by third parties – most often accountants – to prepare documents and/or act in transactions (or even litigation) on behalf of clients. Whilst there is obviously nothing wrong with such arrangements of themselves, there is a clear danger for things to go awry if sufficient care is not taken to ensure that proper instructions are given by the actual clients.

A recently resolved Law Claims matter shows these dangers. A firm of accountants, which was acting for some clients in respect of the financing of a property development and sub-division, instructed lawyers to prepare loan agreements and other necessary documentation on behalf of their (mutual) clients who were proposing to lend funds to the developer. The accountants were regular referrers of work to the lawyers. The instructions from the accountants stated that the securities to be provided for the loans were “*when issued a title for a block [of land]*” at the proposed development. The lawyers sought further details (from the accountants) about the land and were advised that the security was to be over two specific allotments but that the sub-division plans were not expected to be lodged with the LTO for another 3 months or so, and that it would therefore be some time until the specific CT references would be available.

The lawyers prepared draft loan agreements and sent them to the accountants warning that the mortgages could not be completed until the CT references were known. The lawyers also told the accountants that the lenders needed to understand that there was a risk in executing the loan agreements without the CT's having been

issued and held by the lenders, and that the security was weak because it was proposed that the monies would be advanced prior to the security existing. After some further communication the draft loan agreements were finalised and executed. The lawyers requested that the accountants notify them when the titles were issued so that mortgage documents could be prepared.

The lawyers' bill was paid and no further communications were had for a number of years until the lender's new solicitor made a claim against both the lawyers and the accountants. The monies had been advanced but not repaid. The claim alleged that the lawyers had failed to carry out proper searches and enquiries in relation to the security and that the loan agreements did not provide adequate security for the loans.

It was apparent from subsequent title searches that the land to be sub-divided and offered up to be as the security was not owned by the borrowers. The lawyers did not conduct any title searches at any time and, in all likelihood, assumed that this had been done by the accountants. The lawyers accepted all of their instructions in relation to the identification of the land and the ability of the borrowers to offer that land as security from the accountants without further enquiry and had little contact with the lenders throughout the transaction. The lenders alleged that had they known the borrowers did not actually own the land they would not have lent the money.

Bearing in mind the obvious issues concerning contributory negligence on the part of the lenders and apportionment of liability between the lawyers and the accountants, a settlement was negotiated with the lenders by the insurers of both the lawyers and the accountants (with the accountants paying more of the settlement sum). Given that the carrying out of title searches was such a simple matter and would have put the lawyers on notice of issues surrounding the borrower there was a clear risk of an adverse finding should the matter have proceeded.

You are probably wondering what all this has to do with constructing flat-pack furniture. Some people, after arriving home from Ikea, jump straight into putting together their new purchase and only **after** finding three screws and piece of dowel left over do they consult their instructions: they assume that they know what to do and what will happen – and often they are wrong.

Legal practice should **not** be like this – never make assumptions about your instructions. Clarify them and confirm them in writing wherever necessary and be especially careful where a third party, such as an accountant, is involved in providing instructions. It will, at times, be necessary to go "*straight to the horse's mouth*", and deal with the ultimate client directly so that there is no misunderstanding or miscommunication, just as it is always better to consult those Ikea instructions **before** your bookshelf falls apart.