



Issues for Law Claims in the area of property law

By Gianna Di Stefano, PII Risk Manager

We continue to see a variety of circumstances being reported in the property law practice area.

Law Claims data indicates that in the last 2 years, 14% of all claims occur in this area of practice.

Our database further reveals that the areas of Leases, Land Transaction / Conveyancing and Stamp Duty account for the majority of property law claims.

Some of these notifications become litigated claims. Other notifications which do not become claims are resolved. Some matters are simply notified to us out of an abundance of caution.

Below are some examples of the types of circumstances which are finding their way to Law Claims:

Case 1 - Incorrect caveat details

The practitioner acted for clients in relation to a dispute with their landlord concerning alleged breaches of the terms of the lease and the landlord's apparent refusal to grant an extension the lease. In order to preserve the client's position in relation to the leased premises a caveat was lodged over the property. The caveat incorrectly described the date of the disclosure statement accompanying the Memorandum to Lease (by 1 year).

The practitioner, after realising the error, lodged an application seeking leave to correct the caveat and, lodge a further caveat.

Fortunately for the practitioner, a settlement was achieved in a manner whereby the caveat issue became irrelevant. No-one had noticed the issue concerning the caveat other than the firm in question and, it became a 'non-issue' as the matter moved towards an overall settlement.

Risk Management issues

- A typographical error on the caveat triggered the claim.
- This case illustrates the need to double check wording of documents against source documents or primary documents especially where documents are prepared under time pressure.

Case 2 - Drafting error in Deed of Surrender

The practitioner acted for the client in relation to a lease of commercial premises.

During the term of the lease, the client licensed and sublet several areas of the premises to various tenants. Later, the client agreed with the Landlord to surrender a portion of its area in the premises and assign each of the subtenancies to the Landlord.

The client entered into negotiations in respect of the Surrender Agreement with a view to achieving the partial surrender of the premises, together with the assignment of the subtenancies, and its obligations under those subtenancies, to the Landlord.

The parties agreed that as a result of the Surrender Arrangement the base annual rent payable under the Lease would be decreased from the existing rent. The Deed of Surrender should have made provision to modify the rent review provisions by deleting certain subparagraphs to ensure the rent review was appropriate.

The Landlord subsequently purported to increase the Agreed Rent to an amount that was significantly higher.

Fortunately, the client and the landlord were able to resolve the matter by executing a new lease which included as a term a release of any claim or potential claim arising from a surrender of lease previously drawn by the practitioner.

Risk Management issues

- In this case there was a drafting error; failure to document the client's instructions and failure to check documents.
- Upon drafting a document, undertake a thorough review of all the provisions and assess those terms against the instructions given and the commercial objectives of the parties to enable errors to be detected at an early stage.

Case 3 - Mortgagee's consent required

Prior to the execution of a lease, the practitioner failed to advise the client about the fact that there was a registered mortgage over land that he was leasing, or the fact that the lease could not be registered without the mortgagee's consent, as result of which he claims to have made lease payments, and invested monies in developing land, from which he was later evicted by the mortgagee. He also sought recovery of costs paid to the insured, as well as costs paid to the mortgagee in relation to the eviction proceedings.

Proceedings were lodged and at a settlement conference, settlement was negotiated on the basis of a payment of \$60,000.

Issues for Law Claims in the area of property law *continued...*

Risk Management issues

- The paper work on this file was poor. There was no written retainer, and virtually no file notes. The critical error however, rather than poor paperwork, was a failure to appreciate the need to obtain the mortgagee's consent to registration of the lease.
- Do not accept the client's word that there is no mortgage. A search can reveal otherwise.
- It is easy to become distracted by other aspects of a transaction. Even on the most limited retainer, the client must be warned of the need to obtain the mortgagee's consent.

Case 4 - Acting for both parties – conflict of interest

The practitioner agreed to act for both vendor and purchaser in order to minimise fees in relation to the sale and purchase of a restaurant business and, to obtain the approval and transfer of the restaurant license.

Changes to the draft agreement were requested by the vendor in relation to deleting the weekly takings warranty which was agreed upon and the agreement signed.

The purchaser subsequently wanted to withdraw as "the turnover of the business was too low." The practitioner then identified having a conflict of interest (there was a takeover of the business before settlement). The vendor sued the purchaser for failure to perform the contract and sought to recover his costs from the solicitor.

This claim cost the scheme \$55,000. There were insufficient file notes and written confirmation to clients of advice given by the practitioner.

Risk Management issues

- Here the practitioner acted for 2 parties in the sale of a business – things went badly and there was no adequate documentation by way of file notes to defend the action.
Advice / lesson learnt – do not agree to act for both parties to the same transaction – there was disagreement as to the scope of the engagement, and inadequate or incomplete advice on the risks or options available.
- When the other party is unrepresented tell him / her you are not acting and recommend the party obtains separate representation and advice. Confirm this in writing.

Case 5 - Failure to check documents

The practitioner was acting for clients regarding certain conveyancing work required in respect of the estates of their father and mother. The practitioner transferred the property to incorrect beneficiaries and not according to the terms of the will.

The mistake effected by the practitioner meant that the wrong parties in the wrong shares were on the CT to the property. The intention of the family was to have sold the property as soon as possible, however, the sale and distribution could not go ahead until the error was fixed.

The family was co-operative and through a process of agreement and co-operation those people who mistakenly appeared on the CT proceeded with the sale of the property on the basis of an agreement to distribute sale proceeds in accordance with wishes of the deceased.

Rectification was effected at a cost of the claim at \$30,000.

Risk Management Issues

- Clearly, a failure to check documents, failure to properly document and not following the clients instructions.
- While it may seem like a formality, transfers of land need to be very carefully proof read to ensure they are accurate.

The above are examples of the sorts of claims / notifications that are being received. If you believe there are any circumstances which you presently find yourself in that may result in a claim being made against your practice please contact Law Claims.