

## **Acting for the Lender**

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## **ACTING FOR THE LENDER**

What we often see with younger lawyers is an eagerness to overcomplicate real estate transactions. This is not to say that there aren't certain real estate transactions that are complicated; simply that there is no need to search for complications. That being said, when you are starting out in this exciting area of practice you have to be cognizant of who you are dealing with as well as what you are looking out for.

By the time you have moved into this section of the materials likely you have already reviewed the materials on Acting for the Buyer and Acting for the Seller. You have a fairly good understanding of what sort of things to look for during and after a real estate transaction. Unfortunately, and phone calls to lawyers bear this out, lawyers tend to forget about the very important third client at the table in the vast majority of real estate transactions: the Buyer's Lender (I will not deal with situations of refinancing separately except where needed as the process and concerns are similar).

The Lender brings not only a lot of money to the table but also a lot of responsibility for real estate lawyers and we underestimate them at our own peril. At the initial onset of the most recent Bank of Montreal mortgage claim, I know that most real estate practitioners were concerned that they may be named, not because of any intentional actions on their part but simply because of the fact that as lawyers we are at risk sometimes simply for doing our "job" as we view it. As you become a busy real estate practitioner you will invariably have to come to the point where you employ the services of legal assistants and support staff and will come to rely on them heavily for the day to day operations of your practice. Learning to dot the "i's" and cross "t's" is not only good practice; it is a great survivor skill!

The point of this paper is not to provide an academic oversight of the ins and outs of acting for a Lender but is, instead, to provide you a type of "field guide" that you can refer to in your day-to-day practice to better service your client and to avoid potential liability for yourself. You should pay some attention to issues relating to mortgage fraud as this is a concern for not only you but all of us as lawyers. Ultimately, mortgage fraud destroys confidence not only in the market but also in us as lawyers.

### **1. RECEIVING A CLIENT CALL, MORTGAGE INSTRUCTIONS OR A PURCHASE CONTRACT**

At the initial onset of a transaction you will be contacted in some manner with regards to a new file. In most cases, it is the client contacting you but in others you simply receive a purchase contract or mortgage instructions directing that you are acting for the Buyer or a Borrower. Step 1 in these circumstances is to confirm that you are acting and who you are acting for.

If you have received a Contract, follow the steps in the Acting for the Buyer submission with regards to the Contract itself. Assuming that the Contract indicates that the Buyer is obtaining financing you need to follow some basic steps:

- a) Contact your client immediately to determine which Lender they will be using and to advise them to confirm to their Lender that the clients intend on retaining you to act on their behalf (if it happens that you do not have contact information for the client you may have to contact their agent to obtain that information);

- b) Make note of whether the financing conditions on the Contract have been removed and the Condition Date itself (if there are still conditions outstanding you may want to delay any further action on the file to avoid unrecoverable costs - in some cases the time between the Condition Date and the Completion Day are very tight so some work may need to be commenced);
- c) Follow-up with your client as necessary until mortgage instructions are received. I suggest you diarize your file to a minimum of 7 - 10 days prior to the Completion Day as a bare minimum for follow-up calls;
- d) Confirm with your Buyers/Borrowers that they will be available as necessary to execute the documents. Strangely enough clients have a habit of going on holiday close to the Completion Day.

## **2. REVIEWING AND PREPARING MORTGAGE DOCUMENTATION**

So, now that you have confirmed that you will be acting in some capacity on a particular transaction and have received mortgage instructions you will somehow have to now complete what you have gotten yourself into!

The initial step in every mortgage transaction is to determine who it is you are acting for. In the vast majority of residential transactions you will be acting for both the Lender and the Buyer. However, that is not to say it is always the case. Review your mortgage instructions immediately upon receipt to confirm that there are no specific restrictions on you acting for both the Lender and the client. This can and does happen with commercial lending transactions. Commercial lending practices do occasionally creep their way into what appear to be normal residential files so reading your instructions is key.

Now that you are past this hurdle you can start to review the instructions with a view to understanding how your clients' transaction will be structured and what your exact role will be. There are a number of matters to be aware of in your review:

- a) Who is to be the mortgagee? Does it match the contract? If not, why? This is a red flag that there may be an issue with fraud. Is the Lender aware of any potential changes?;
- b) Confirm the spelling of your clients' names for title purposes (it is surprising how many times there are errors in documents. Do not rely on the Lender's information with regards to the Borrowers. Confirm this directly with your client);
- c) How will the borrowers be holding title? Joint Tenants? Tenants in Common? You will need to discuss this with your clients prior to your meeting as your documents will reflect this decision. Are there Guarantors that you weren't aware of? You will have to contact them and arrange for their execution of the required documents as well and determine if an Independent Legal Advice is required;
- d) Does the description of the Borrower on the Disclosure and Instructions match the Buyer/Borrower client who is instructing you? If not, why? You have to get