



ERRORS

OF OMISSIONS

*A periodic update from the Errors
and Omissions Department*

NUMBER 3 APRIL 1989

WHO REALLY SIGNED? Has This Ever Happened in Your Office? Could It Happen?

It's the middle of the month. There are 20 closings scheduled for tomorrow and you are very busy.

At 3:30 in the afternoon, one of your longtime clients comes in to sign the documents in connection with a mortgage on the matrimonial home. His business is not doing too well and he requires a loan of \$100,000. The bank has instructed you to prepare the mortgage.

He tells you that his wife is ill, and to save time he will take the documents to her to sign and will return them to you first thing in the morning. He knows what to do; you have acted for both of them many times in the past in similar transactions. You agree.

The next day, you register the mortgage and advance the funds to the husband, as per the direction signed by both husband and wife and report to the bank.

Three months later you are served with a Third Party claim. The lender is suing the husband and wife for default of payments on the mortgage. The wife denies knowledge of the mortgage agreement and claims the mortgage is invalid. The husband has vanished. The business is worthless. The bank has joined you as a Third Party. What is your defence?

As you know, mortgage and title documents no longer provide that signatures must be witnessed. Clients are now aware of these changes and are using that situation to your detriment. It is imperative that you ensure the documents are properly executed and that you confirm the identity of the person signing.

Please don't allow yourself to become a victim!

Pension Alert

The valuation and division of pensions in matrimonial settlements is a minefield of potential negligence claims. Lawyers representing the parties to a matrimonial dispute must ensure that they investigate the existence of any pension plan, obtain full particulars, have the plan correctly valued by an actuary and ensure that any

settlement between the spouses involving a division of the plan is enforceable.

The division of the pension plan for purposes of a matrimonial settlement is fraught with uncertainties. The *Pensions Benefit Act* of Ontario does not currently allow for pension credit splitting between spouses at the time of settlement. A settlement based on a division of the pension when it becomes payable on the retirement

of the member spouse may be unenforceable. Proceed with **extreme caution** when dividing a pension on such an "if and when" basis. There is no guarantee that such a division will occur as agreed to by the parties. There is no guarantee that the pension fund administrator will give effect to an "if and when" division pursuant to a domestic contract between the spouses.

A recent Continuing Legal Education Program on pensions and the *Family Law Act* extensively canvassed the difficulties inherent in valuing and dividing pensions. The materials in that program should be reviewed before settling any matrimonial dispute involving a division of pensions.

For The Record

Did you know that 50% of the files opened in our office are closed without payment of a claim?

**Here's an example of a Winner!
(We were awarded costs too)**

The lawyers acted for clients who were selling a farm implement dealership. On the day of closing, the husband and wife advised their solicitor of arrangements they had made with the purchaser to handle post-closing adjustments. There were still accounts receivable and payable by the vendors which would have to be dealt with. The parties agreed to open another bank account in the name of the company at the vendor's bank. The vendor's money was to

be handled through one account; the purchasers' through the other. The solicitor had advised his clients of the confusion which might result, and advised them that the accounts would have to be monitored carefully.

The husband stayed on as employee of the business. He had also been an employee of a bank in the past.

Confusion over the funds did occur. The purchaser sued the bank, which in turn sued the vendor, who sued the lawyer as a fourth party. The vendor alleged that the lawyer ought to have ensured that the banking arrangements were put in writing and ought to have clarified the issue of who had signing authority.

Our defence was simply that it is not the responsibility of a lawyer to give accounting advice after the deal is closed (especially when the clients had retained their own accountants). Shortly after the litigation commenced, we made an offer on the basis that the fourth party action be dismissed without costs.

The clients unwisely rejected that offer. Examinations for discovery lasted 21 days.

The pretrial judge indicated that there was little merit in the action against the lawyer, and the action against him should be dismissed. We offered to go out with party and party costs. Once again, the vendors rejected that offer.

After two days of trial, an Order was made that the fourth party action be dismissed. We obtained costs on a solicitor and client basis.

No appeal.

Beware T.T.C. Short Limitation Period

Actions for indemnity by passengers injured on Toronto Transit Commission "premises" or by the operation of streetcars may be subject to a one year limitation period.

— *Ontario Railway Act*, R.S.O. 1950, c. 331 s. 267 (1)
