



The Law Society of  
Upper Canada

Barreau  
du Haut-Canada

# errors and Omissions

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*a periodic update from the Lawyers' Professional Indemnity Company*

## Mistakes don't always result in a successful claim

Decisions in two recent cases reinforce the fact that it is not always the lawyer's fault when something goes wrong in a legal matter.

In the first case, LPIC spent significant defence costs in a suit against a lawyer who had been retained by a vendor in connection with a sale of development lands. A condition of the agreement of purchase and sale was that the "permit servicing" was to be completed by the vendor at a certain date. In the event that the condition was not fulfilled by that date, there was an option that the vendor could extend the agreement by two successive periods of six months each. The condition of exercising that option was that notice was to be communicated prior to the last day of July 1990. The lawyer allegedly faxed a notice of extension to the purchaser prior to that date but there was never any proof that the fax was ever sent or that it reached its destination.

As a result, the purchaser refused to complete the transaction and commenced a lawsuit against the vendor for return of the deposit of over \$600,000. The vendor in turn sued the lawyer for damages including lost profit.

After 60 days of trial the court accepted the position that the damages sustained by the client were not caused or contributed to by the member's negligence. The following is a quote from the judgement:

"The failure to deliver the notice on a timely basis was negligent and in breach of its retainer by the Corporation. However, the losses sustained by it were not caused nor materially contributed to by the negligence/breach of retainer of the law firm - they were caused by the precipitous decline in the market. Moreover, in the alternative and assuming the negligence/breach of retainer was causally related to the loss, the failure to complete the permit servicing requirements by July 31, 1991, was inevitable, beyond doubt and predestined. Further in the alternative and assuming the completion of such permit services was reasonably probable, the losses referable to parts of the subdivision other than Country Glen are too remote as a matter of law to be recoverable. While the out-of-pocket expenditures of the Corporation are substantial, approximately \$20,000,000, they have not been wasted and, consequently, no damages are awarded for them. However, given the negligence/breach of

retainer by [the law firm], nominal damages in the amount of \$10,000 shall be paid to the Corporation."

LPIC had made an offer to settle prior to trial significantly greater than the \$10,000 awarded. The issue of costs has not yet been resolved.

In a second case, clients sued a law firm for \$900,000 in connection with the failure of a purchase transaction to close. The following are quotes from the judgement:

"The agreement was due to close originally on August the 1st, it was extended to August the 22nd, and it was reconstituted to September 5th. It failed to close. Indeed, the defendants (lawyers) endeavoured to close the deal on September the 6th, but by that time the property had been sold to another company.

When the plaintiff discovered that situation, he jumped to the conclusion that his solicitors were conspiring behind his back. It became clear from the evidence that the two solicitors, were not at any time aware of the other deal. That was confirmed by the solicitor for the vendor.

The critical issue is whether or not the plaintiff was advised of the closing on September the 5th. I find, without any hesitation, that he was



so advised both by lawyers. He failed to show up. As a result, all the attempts on September the 6th to close the transaction were irrelevant because the property had already been sold.

Without going through all the documentation, there is written corroboration of the evidence of the

lawyers in diaries and notes that the solicitors recorded. But, in any event, the plaintiff was never ever in a position to close this transaction, even on September the 6th. He arrived with cheques and cash after the registry office had closed, about six or five-forty-five, at his solici-

tor's office — some of the cheques were not certified. Even if he had arrived at four o'clock, the law firm could not have issued a certified trust cheque, because all the cheques were not certified.

So, for those reasons, the plaintiff's claim is dismissed."