THE LAW SOCIETY OF UPPER CANADA

ERRORS & OMISSIONS

A periodic update from the Errors and Omissions Department

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CHEQUES VIA COURIER?

We now have 35 open files dealing with the loss of certified cheques varying in amounts from $8,000 to $350,000.

Do you know that:

(1) If the courier loses the cheque, the liability is limited to $4.41 per kilogram?

(2) The banks will not stop payment on the certified cheques?

(3) The drawer of the cheques will be requested by the bank to sign a broad bond of indemnity no matter who loses the cheque or how it is lost?

(4) In some cases, the banks have demanded from the drawer further security in the form of a mortgage or deposit.

If you are sending cheques to your client or to an institution to discharge a mortgage, for example, consider having the money wired from one account to the other.

So What's the Difference?

A joint tenant can sever a joint tenancy by conveyancing to himself. This is not a disposition of property.

But a conveyance to a Third party is a disposition of property.

So what's the difference?

The difference in one matter cost you $20,000.

The female client was terminally ill with cancer. She and her husband owned the matrimonial home as joint tenants. She had a good relationship with both her husband and her daughter. Unfortunately the husband and daughter did not get along with each other.

The client feared that after her death, her husband would disown the daughter. The wife came to the solicitor for advice as to how she could ensure that her half of the house would belong to the daughter.

The solicitor explained that her husband's consent would have to be obtained in order for her to transfer her interest in the matrimonial home. The wife did not want to approach her husband for his consent. The lawyer then drafted a deed without spousal consent transferring the interest of the mother to the mother and daughter jointly.

After the wife's death, the father and daughter had a falling out. The father brought an application to have the conveyance set aside,

on the grounds that the property was the matrimonial home and could not be conveyed without his consent. He was successful.

The daughter claimed against the solicitor. She claimed a loss of $65,000 -- one half of the value of the house. She obtained $20,000 by way of settlement from her father and we settled the matter for $20,000.

It's 3 p.m. Do You Know Where Your Partners Are?

In October 1987, the Ontario Court of Appeal handed down a unanimous decision which could well affect you. A lawyer was found liable to his partner's business associates for debts incurred in an unsuccessful business venture. There had been no formal retainer of the firm for legal services and no legal accounts sent out by the firm.

Under ordinary business circumstances, the investor might be viewed as quite a shrewd businessman. He entered into a rather risky business venture with 2 friends. It was agreed that each would deposit $30,000 of securities with the bank to support the bank's loans made to the newly incorporated company. In addition, all 3 signed a joint and several guarantee to the Bank in the amount of $200,000 and a further guarantee of over $50,000.

The investor neglected to tell his co-venturers that he was judgment proof.

He also refused to honour his undertaking to deposit $30,000 of securities with the bank.

The business rapidly deteriorated and the company made an assignment in bankruptcy. The bank sued all three on their guarantees. The investor did not defend the action, and the bank obtained default judgment against him. He then commenced an action for a declaration that he was not liable to contribute to his co-guarantors. Not surprisingly, the others claimed against him.

There were two characteristics that set this investor apart from the other two investors. One, he was a lawyer – a lawyer who had acted for both men in a number of transactions in the past. And two, he had a law partner.

The Court of Appeal posed 4 questions.

(1) "Do the facts in this case give rise to a finding that a solicitor-client relationship existed at the relevant time?"

The Court found that the lawyer was the solicitor for the company and owed a duty to its directors, even though no formal accounts were rendered. They were never advised to seek independent legal advice. Because of the previous legal work done, the court held that, "The other two would look upon the lawyer as their solicitor and expect to receive advice with regard to liabilities they were incurring on behalf of the company."

(2) "What, if any, duty of disclosure was owed by the solicitor to his former clients?"

The court said, "The very nature of legal work requires a lawyer to become the essential 'confidant' of his client, the holder of confidential information pertaining to the client".

If a lawyer is entering into a transaction with clients **or former** clients, "The lawyer is bound to make a full disclosure of his position so that the client is not placed at a disadvantage". The lawyer's failure to disclose his judgment proof status was in breach of this duty.

(3) "What circumstances can lead to a solicitor being found to be in a fiduciary relationship to former clients?"

Although the Court of Appeal agreed that a guarantor does not owe any duty of disclosure to co-guarantors, it held that the lawyer had a fiduciary duty to disclose his financial situation because of his position as their former solicitor.

(4) "If either the solicitor-client or fiduciary relationship is found to have existed and to have been breached by the solicitor, what may be the consequences for a partner of that solicitor?"

The Court held that the partner was liable for damages.

The damages flowing to one investor amounted to $317,998.96 plus pre-judgement interest, and to the other, $43,953.44 plus interest.

Korz v. St. Pierre et al 61 O.R. (2d) 609.