When things go wrong in a conveyancing transaction

Professor Stewart Brymer offers some useful guidance on the most appropriate course of action to take when things go wrong in a conveyancing transaction.

One thing we can always be sure of is that things can and do go wrong – often as a direct result of one's actions or, most often, as a consequence of such actions or those of others.

Unfortunately, it is not uncommon in such circumstances for the error to be compounded either by further acts or omissions or by burying one's head in the sand.

A transaction involving the sale and purchase of heritable property is viewed by some as being straightforward, and the associated conveyancing is often seen as a commoditised item. There is a difference between modernising or streamlining a process while maintaining standards and speeding it up at the loss of quality.

Of course, conveyancing transactions can be straightforward. However, even the most straightforward transaction can involve difficult issues that may be easily overlooked. In truth, a contract for the sale and purchase of heritable property is complex consisting, as it does, of a number of provisions dealing with everything from the transfer of title to the state of the central heating and other services.

Even with the increasing move towards standardisation (which is a positive development) there is still considerable opportunity for risk.

It may seem trite to say, but such risk as exists requires to be managed – not least for professional indemnity insurance reasons.

So what if something goes wrong?

1. Identify the problem

If a problem is identified, the first step is to speak to a colleague and ask for an independent review of the matter. Such objective analysis can be invaluable. If the issue is a title problem which cannot be resolved (the writer having been taught by Professor AJ McDonald that no conveyancing problem is insolvable!) or, indeed, it is expedient to find another solution, then title insurance may be the answer. In that event, speak to your local First Title as soon as possible and, above all, do not try to fix the problem you hope to insure against.

Any communication with a neighbouring proprietor who may have title and interest to enforce a real burden will negate the availability of insurance cover. Title insurance is often a pragmatic and cost-effective solution to a title problem and is a useful addition to a property lawyer's tool kit – contrary to what I was taught!

2. Notify your insurers

What though of the position of there having been an alleged breach of a contractual duty of care or a claim for professional negligence?

In such circumstances, the first thing to do is to speak to your firm's Claims/Complaints Partner who, after a review of the facts, may require to intimate a "circumstance" to the professional indemnity insurers. The Law Society Master Policy brokers will then assess matters in light of the three-part test established in the case of *Hunter v Hanley* 1955 SC 200 where Lord President Clyde stated that:.

"To establish liability where deviation from normal practice is alleged, three facts require to be established. First of all it must be proved that there is a usual and normal practice; secondly it must be proved that the defender has not adopted that practice; and thirdly (and this is of crucial importance) it must be established that the course adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care. There is clearly a heavy onus on a pursuer to establish these three facts, and without all three his case will fail. If this is the test, then it matters nothing how far or how little he deviates from the ordinary practice. For the extent of deviation is not the test. The deviation must be of a kind which satisfied the third of the requirements just stated."

3. Instruct an expert opinion

An opinion from an expert in property law and practice will likely be required at that point so as to assess how an ordinary solicitor experienced in conveyancing, acting with ordinary care and skill would have acted in the circumstances of the matter in hand. That is often not a straightforward judgment call as much depends on the level of knowledge and the state of practice at the relevant point in time.

As stated by Professor Robert Rennie in his book on Solicitors' Negligence, *"many claimants think that if something goes wrong there must be a claim."* This is not necessarily the case. The standard of care is essentially a negative evidential test. What must be shown where deviation is alleged, is not just that some members of the particular profession would have acted in a different way.

It may not even help to show that the vast majority of professional persons would have acted in a different way. It must be shown that "*no other professional acting with ordinary skill would have acted in the manner complained of."*

Summary

In any given situation, there may be a range of options open to a solicitor of ordinary competence. If the solicitor has chosen one of these options and it turns out to have been the wrong one, then that will not necessarily mean that there has been negligence provided the option chosen was one which a solicitor of ordinary competence might have chosen. Essentially, this is the difference between a negligent act and the exercise of a judgment.

The general duty of care owed by a solicitor to a purchaser in a modern conveyancing transaction has been described in the following manner in the case of *Graybriar Industries Limited v Davis & Co* [1992] 46 (B.C.L.R. 2 (d) 164,181), namely:

"A person who goes to a lawyer with respect to a land transaction is entitled to expect that lawyer to investigate the state of any title that is germane to the matter and to explain to the client exactly what it is that is portrayed by the state of the title".

A property lawyer's duty is to translate the terms of the title and other matters in the contract so that his/her client understands same and can give him/her informed instructions. By way of final comment, do not be tempted to try to fix matters with your client. Such efforts invariably fail and often only serve to produce more challenges – not least that an admission of liability may negate your professional indemnity insurance!

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