Real Estate News

Bruno Uggenti

The Case for Fees based on the Handling of Trust Funds in Real Estate Transactions, in Addition to Risk and Liability Exposure and the Legal Processing of Transactions

(an excerpt from a larger paper being prepared for publication)

co-edited by Daniel Lawlor and Paul Lawson

Real estate transactions in Ontario deal with matters that are usually an individual's greatest and most valuable asset: their home. In commercial transactions, property transactions oftentimes outweigh the value of the other endeavors of that business. Why is it then that members of the public have been socialized over the years to ask for and expect "the lowest fee possible" for legal fees for the amount of work, legal expertise, exposure to liability and the handling of funds that only lawyers are able to provide in Ontario?

The Court of Appeal recently has rendered a decision that should cause us to pause and reflect on the risks and potential liability of a lawyer involved in real estate transactions. In the case of *Meridian Credit Union Ltd.* v. *Baig* (February 2016), appealed from [2014] O.J. No. 3811, the risks of lawyering in an ever-changing environment and the potential liabilities in dealing with real estate transactions for clients becomes more apparent, and in the author's view begs the issue, though not addressed, of appropriate compensation generally for real estate lawyers, the vast sums of money they are responsible for, and the uncompensated handling of these trust funds in comparison to other professions and industries.

This paper will focus on the merits of the concept of not just charging a legal fee for the handling of the real estate transaction itself, but also receiving compensation for the handling of trust funds in the transaction. Guarding the purchase or sale funds is the unwritten or unacknowledged aspect that all parties know lawyers have to do, but to whom all the other parties do not want to compensate for taking on such an important role and potential liability. The lawyer's role in handling huge amounts of trust funds in the real estate transaction is of crucial importance, and ought to be compensated accordingly.

Of all the parties in a real estate transaction, including the realtor, the mortgage broker, the banks and other lenders, and lawyers, it is the lawyer who is required to protect the client's legal interests. Lawyers conduct title searches and off-titles searches such as executions, review and prepare the legal documents for the purchaser, seller and lenders, register the transfers and mortgages, and ensure that the client's money is distributed to the right parties and in the right amounts. The realtors do a fabulous job at marketing properties and signing standard agreement forms, and they will handle relatively minimal deposits for a transaction; mortgage brokers do a wonderful job at qualifying borrowers for mortgage loans and matching up borrowers to lenders; and lenders do a terrific job at making sure that the lawyer does everything possible to protect the lender's money while they, the lenders, create a lucrative stream of income on their lent funds well into the future.

The realtors will usually split a commission that is based on the value of the property, typically in the 4% to 6% range, plus applicable taxes. The mortgage brokers will usually receive a mortgage broker fee on the value of the loan usually in the 1% to 3% range, and this is oftentimes paid for by the lender for having the mortgage broker "find" the borrower to create this future stream of income. And the lender will usually charge a mortgage interest rate that is well below what its customers are receiving for monies held on deposit, based on the value or amount of the mortgage funds lent out to the borrower. The lender will never give these funds to the borrower directly; they expect the lawyer to handle and distribute the mortgage funds, and if the lawyer does not do it "properly", watch out! Lawyers also take on double the liability by acting for both lender and purchaser, but typically cannot double their fees.

Handling trust funds in a real estate transaction is the key aspect of the transaction that none of the other parties do, in addition to the searches and documentation preparation. The lawyer is expected to do so, as part and parcel of the relatively minimal fee charged in a real estate transaction. This usually comes nowhere close to what any of the other parties receive as compensation, and for lawyers this usually runs in the ¼% range of the value of the transaction, if that!

It is also quite interesting to note that legal fees are oftentimes less than the HST on real estate commissions, never mind the real estate commission itself!

Therefore, it is my contention that as a result of the obligation to handle the trust funds in a real estate transaction, the real estate lawyer must take steps to charge clients an appropriate amount for doing so. I would contend that such amount must be at least 1% of the trust funds handled by the lawyer.

Comparable Industries and Other Parties

Investment Advisers

The vast majority of Investment Advisers continue to be paid through commissions, and each time they buy or sell shares their clients must pay them a fee for executing the trades.[1] I understand that most advisors will typically charge the client anywhere from 1% to 5% [2], and the Globe article, referred to in note 1 above, goes on to state that "An adviser who sells $1-million worth of new shares earns a cheque worth $20,000 – often in a matter of minutes." In fact once the asset is purchased, there is ongoing compensation, and "Advisers are paid a straightforward percentage of the money they manage – typically about 1 to 2 per cent of the assets under their watch…"

Currency Exchangers

It is even more interesting to note that when banks or currency exchange services convert currency, the cost of the exchange (as distinct from the rate of exchange) is typically about 3%. Based on rates on February 28, 2016, to buy $1,000 US dollars, it costs typically $1,382.50 CDN at banks. The actual foreign exchange rate to obtain $1,000 US dollars, is $1,351.30 CDN at some exchange centers (not banks), which already includes a profit margin. This is at a point in time when the actual exchange rate is 74 cents CAD to USD. Based on the information researched, the financial banks and exchange institutions have charged a fee of $31.20 on $1,000.00 or 3.12%, in this example. Therefore, on a $300,000 handling of exchange of funds, the fee would be $9,360.00! When was the last time that amount was charged on a real estate transaction of $300,000.00?

Loan Officers

Banks, mortgage companies and credit unions employ loan officers, and most receive a commission on the loans they approve, (and based on the Article reviewed it is this fact) which motivates them to approve more loans.[3] Yet the loan officers do not even handle the funds!

Literary Agents

A literary agent usually receives a 12 to 15 percent commission on the sale of a book, and performs a range of duties that include editorial assistance, research, contacting publishers and negotiating contract terms.[4] Again, they are not handling the funds.

Insurance Sales Agent

Some insurance sales agents work for individual insurance companies, while most work for insurance brokerages. Many receive payment by commission only.[5] Other than receiving insurance premiums, Insurance Agents do not handle the funds for the amounts of insurance coverage sold. Contrast that to the role of the lawyer.

Other Occupations and Professions

There are many occupations that are compensated based on a commission or percentage of the transaction or contract involved, including sales of construction materials, advertising, computer sales, employment headhunting, and even litigation lawyers.

Fees also associated with Risk

In the recent Ontario Court of Appeal decision in *Meridian Credit Union Ltd*. V. *Baig* (February 2016), this was an action by Meridian against Baig which sought an accounting for the profit Baig made on the re-sale of a building on which Meridian held a mortgage. Originally, the mortgage had fallen into default and the court had appointed a receiver, who sold the building to Baig for $6.2 million, not knowing that Baig had already purported to resell the same building to another party for $9 million. The closing of the two sales was to happen concurrently, and therefore Baig had his lawyer list the subsequent purchaser instead of himself as the purchaser from the receiver on the closing documents. This apparently gave the receiver the erroneous impression the subsequent purchaser was Baig's own company, when in fact it was a third party purchaser. Upon discovery, the receiver assigned its cause of action against Baig to Meridian, and Baig then moved to summarily dismiss the action. The Court held that the action was allowed, Baig was found liable to Meridian for fraudulent misrepresentation. Although he had no duty to disclose the subsequent agreement to the receiver, Baig had a duty to correct the receiver's error in believing the company was Baig's own company once he had his lawyers make misrepresentations on the closing documents that gave rise to this belief. On appeal, the Court of Appeal found that Baig had deliberately misled the company handling the bankruptcy by failing to alert them to the resale.[6]

The article by the Canadian Press states,

> T*he Appeal Court also dismissed a claim by Kiborn and his firm, Miller Thomson, that they were denied natural justice when Myers made findings about them that could damage their reputations in their absence.*
>
> *"Non-parties should not be able to lurk in the shadows and then spring up to challenge a decision whenever the outcome -- or findings of fact -- may affect them in some manner they do not like," the Appeal Court said.*
>
> *It found Myers' findings reasonable and "amply supported by the evidence."*
>
> *Baig launched a suit against Kiborn and Miller Thomson in 2012 in hopes of being shielded from having to pay Meridian any money.*

While this case raises many interesting points from the perspective of a real estate practitioner, I would like to focus on the issue of determining fees for such a transaction. While I am not in any way suggesting that there was any wrong-doing by counsel for the parties, or that there is any liability on the part of the lawyer or lawyers involved in the transaction (that is for the Court to determine), if for any reason the client or clients decided to make a claim against the lawyer (which he has, see 2016 ONCA 150 (CanLII)), then how could the cost of a basic insurance deductible of $6,000 plus the possibility of increased premiums on liability insurance for the next several years for a lawyer in such a transaction in any way justify fees on a real estate transaction of this type in the $10,000 to $20,000 range? I submit that it cannot. By comparison, the handling of trust funds in the transaction in the range of 1% would generate fees in the range of $62,000.00 and make the transaction fee more justifiable from the perspective of handling such funds and the potential liability to the real estate practitioner. Or $4,000.00 on a residential purchase where the purchase amount and trust funds handled are $400,000.00.

Conclusion

Lawyers should charge legal fees for their work in reviewing contracts, conducting title searches and off-title searches, for preparation of closing documents, and the task of facilitating the real estate transaction process; however, real estate lawyers are expected to also take on more. They are expected to receive, handle, filter, and distribute to the parties to which the trust funds handled should properly be paid. This is the role of the "trust". This is the one aspect that has been lost over the years, and the one fundamental and crucial role for which the real estate lawyer should be, and has not been, compensated.

Since the handling of trust funds in a real estate transaction is the key aspect of the transaction that none of the other parties involved in the transaction are tasked to deal with, and which duty of "trust" is placed squarely on the shoulders of the real estate lawyer, in addition to all of the searches and documentation preparation, it is the position of the writer that real estate transactions should be based on a fee of 1% of the value of the trust funds handled in the transaction. ■

(Endnotes)

1 Tim Kiladze, The Globe and Mail (includes correction), Published Saturday, Nov. 23, 2013 7:00AM EST, Last updated Monday, Nov. 25, 2013 7:41PM EST, http://www.theglobeandmail.com/report-on-business/canadas-trouble-with-investment-advisers/article15574647/?page=all

2 http://www.moneysmartsblog.com/how-financial-advisors-get-paid/

3 http://work.chron.com/five-careers-generally-paid-commission-8256.html

4 Ibid.

5 Ibid.

6 (The Canadian Press Published Thursday, February 25, 2016 2:15PM EST), http://toronto.ctvnews.ca/hiding-bankrupt-property-flip-fraudulent-misrepresentation-court-rules-1.2792798 and 2016 ONCA 150 (CanLII)

Bruno Uggenti is a partner at Campbell Mihailovich Uggenti, LLP. He can be reached at: bruno@cmulaw.com