

Focus REAL PROPERTY

Tips on closing from a real estate litigator



Todd Christensen

It seems axiomatic that all closings are last-minute. Representing execution creditors, our firm works every day with real estate lawyers who are urgently trying to close a sale or refinancing in the face of a troublesome and generally unexpected writ of seizure and sale.

As a result of many years of

handling thousands of writ payouts for execution creditors, we have learned a couple of things that can substantially de-stress and expedite the process; things that I think every real estate practitioner would appreciate knowing.

Solicitors' statements

First is the use of a "solicitor's statement" on electronic transfers. These avoid the inconvenience and delay involved with traditional methods of withdrawing writs of seizure and sale, either by letter or personal attendance at the enforcement office. Unlike

Superior Court writs, Small Claims Court writs cannot be withdrawn electronically, making this inconvenience much more prevalent since the increase of the latter court's limit to \$25,000.

Many real estate lawyers are not aware of this option for easily and instantly—with the writ-holder's authorization—releasing the property in question or all properties from being subject to the writ. In Ontario, the relevant solicitor's statements are 804 and 820.

■ 804: A complete, unconditional and unqualified release from the judgement [sic] creditor for the writ has been obtained.

■ 820: The judgement [sic] creditor named in this writ releases any interest under the writ in this parcel.

You can find them in the Teranet online user guide at <https://www.teranetexpress.ca>.

We use an 820 statement where proceeds of a sale are insufficient to satisfy the writ but a portion is going as a partial payment of the judgment debt. This allows the property to be transferred not subject to the writ but to remain in place for the balance owing to catch other property transactions by the debtor, and to preserve the execution creditor's right to share in garnishment proceeds generated by other judgment creditors. Where the writ is paid in full, using an 804 statement has the same effect as withdrawing the writ, and allows the transaction to close right away and the writ to be withdrawn later by letter.

All that is required to use these solicitors' statements is a faxed letter or an e-mail from the execution creditor or its lawyer authorizing the use of the given statement in the transfer.

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Writs for discharged debts

Second is the common misunderstanding of the impact of writs of seizure and sale on the property of a discharged bankrupt that was not dealt with by the trustee in bankruptcy. Real estate lawyers often run afoul of rule 60.15 of the Ontario *Rules of Civil Procedure*. They mistakenly believe that if a bankrupt has been discharged, the creditor must withdraw on demand any writ in relation to a discharged debt.

Rule 60.15 provides that the debtor may apply to the sheriff to have the writ withdrawn, and then gives the creditor 30 days to move for an order under the *Bankruptcy and Insolvency Act* that the judgment debt is not released with respect to real property. A common scenario that might invite such a motion is if the debtor's property was not dealt with properly by the trustee.

The trustee is obligated to real-

ize the equity for the benefit of creditors. The trustee must do this by either selling the property or requiring the debtor as a condition of discharge to pay into the estate the net realizable value of the equity. In the second scenario, the value of the property must be established by professional appraisal.

Too many trustees abrogate this responsibility by engaging in what is known in the industry as NANI bankruptcies—"No Assets No Income." In a NANI bankruptcy where the bankrupt owns real property, the trustee facilitates the bankrupt making a misrepresentation in the Statement of Affairs by listing the property value as being equal to encumbrances.

When a discharged bankrupt asks a creditor to withdraw a writ with respect to a pre-discharge debt, the creditor is entitled to decline the request and require the debtor to follow the procedure in rule 60.15. Screening all transactions at the outset for clients who are discharged bankrupts, and adjusting timelines to accommodate the possibility of an execution creditor declining to withdraw the writ, could save you unnecessary aggravation.

Your best chance of persuading an execution creditor to withdraw the writ voluntarily is to provide evidence that the bankrupt paid the net realizable equity into the estate, or to provide a professional appraisal that establishes there is no equity for the writ to secure.

Todd Christensen is the principal of Christensen Law Firm in Cambridge, Ont. His firm restricts its practice to unsecured debt collection and has been a leading innovator in mass litigation for large credit granters.

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Service: An opportunity for adding value

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tion or overcoming a particular title issue. Further, it is often quoted that one of the fundamentals of a free and thriving democracy is private land ownership. Lawyers should be proud to be part of an industry that allows individuals to amass wealth and which drives the economy.

It is true that there is tremendous pressure on legal fees in general, and specifically in real estate, but the bar has permitted the downfall by not always responding to our clients' need for information, security and timely delivery. Lawyers need to better promote the value they bring to the transaction: the added value an experienced real

estate lawyer delivers when the client is properly engaged, and the real bargain the clients in fact receive when they pay a proper fee for good service and attention to what matters. The Working Group on Lawyers and Real Estate promotes a suggested fee schedule which allows lawyers to demonstrate to their clients what a proper fee should be and, even if they do not follow it to the last dollar, permits a valuable comparison to their fees.

Lawyers should re-engage clients, spend time with them to ensure they understand what is important in the subject transaction and use the innovations to accomplish the value-added tasks in a more efficient and cost-

effective fashion. Of course, good client communication should help to reduce claims against lawyers and increase client satisfaction. We are constantly reminded that communication is the No. 1 reason for claims. Let's raise the standards that real estate lawyers deliver to their clients and ensure that we remain a vital and integral part of the real estate transaction of the future.

Raymond Leclair is the vice-president, public affairs, at Lawyers' Professional Indemnity Company (LAWPRO).

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