

Lenders must be careful who they provide mortgages to: B.C. Court of Appeal

BY FIONA ANDERSON, VANCOUVER SUN APRIL 7, 2009

Homeowners can rest easier, but lenders may be scrambling, as British Columbia's highest court rules in favour of the owners and leaves lenders holding the bag when someone fraudulently takes out a mortgage on property they don't own.

In two decisions released Monday, the B.C. Court of Appeal said mortgages placed on property by someone who had fraudulently transferred ownership to themselves were invalid, and the lenders could not collect from the legitimate owners.

In both cases, an unknown party had forged documents that transferred property into the name of a known co-conspirator, and then taken out mortgages on the property, and left with the money. In the first case, the person took out mortgages totalling \$95,000 from two private lenders. In the second, the single mortgage was worth \$320,000.

The lower court had transferred title of the properties back to their rightful owners but said the mortgages still stood, leaving the value of the properties seriously diminished.

Under the province's land titles system, those homeowners would have been compensated by the province's Assurance Fund — which protects owners against fraudulent loss of property. So it was the government, and the public, who would have lost out in the end.

With seven claims made against the Assurance Fund since 2006 involving \$1.6 million in fraudulent mortgages, the Land Title and Survey Authority of B.C. (LTSA), which is responsible for overseeing the fund, decided to appeal the lower court decisions.

The problem in these cases is that both parties are victims of the person carrying out the fraud, said Robert Janes, a lawyer with Miller Thomson LLP, which represented the LTSA in the hearings.

"This is not a bad guy versus a good guy," Janes said. "It's innocent homeowner versus innocent mortgagee."

The difference is if the homeowner is out money because the title is incorrect, the Assurance Fund kicks in. If the lender is out money, because its mortgage is invalid, the fund does not pay out.

The LTSA is given the duty of protecting the fund and it's quite eager to pay those who are entitled, Janes said.

“But they can’t pay out to people who aren’t covered under the Act,” he said.

“The reality is just like in any business dealings there is always the possibility you are going to run into a fraudster and the government doesn’t provide insurance against all forms of fraud,” Janes said.

The Court of Appeal’s decisions surprised lenders.

“The business community and lenders had thought prior to Monday that they could rely on the state of title as shown in the land registry,” said Roger Lee, a lawyer with Davis LLP, which represented the lenders in both cases.

Now that’s no longer the case lenders will have to decide what they need to do to ensure a borrower actually has the title the land registration system says he has, Janes said. They can do that by asking for more security or a credit history, he suggested.

“They are the ones that actually deal with the fraudster,” Janes said.

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