

EXAMPLE B

The recent criminal case of Vishnu (Joey) Poonai is a good example of another set-up. Recently disbarred, Poonai was convicted of four counts of fraud over \$5,000 relating to twelve separate real estate transactions. He played a significant role in this fraudulent scheme, acting for vendors and purchasers, but not for lenders. Instead, he recruited other lawyers to complete the mortgage transactions on behalf of the lenders. He told these lawyers that he was very busy, and that he referred his mortgage work out to other counsel. The recruited lawyers needed the work, and agreed to act.

The promise

The promise is that the recruits will have steady work, and will not have to worry about the clientele. In many cases, the recruited lawyer doesn't even meet with the borrowers and/or lenders. The transactions are presented as *fait accompli*, and the lawyers simply sign where they are told to sign, register documents when ready, and distribute the money as directed. Attention to detail is discouraged. Questions are deflected. Passivity is a valued trait.

The scheme

The scheme generally involves flip transactions and identity theft. The property is purchased at a low price, or at market value, resold immediately for a substantially higher price, and mortgage funds are advanced by a lending institution based on the higher price. The difference between the funds required to close the deal and the mortgage advance is the profit for the fraudsters.

Poonai: The real deal

The reasons in the Poonai decision explain how these particular frauds were consummated. The real deal is that these were mortgage flips. Remember that Poonai did not act for the lenders – only the vendors and purchasers. The agreed facts establish that fraudulent MLS listings, fraudulent market appraisal reports, and false information about the employment income and assets and liabilities of the mortgagor applicants were provided to the banks. In some cases identify theft and impersonation of ostensible borrowers for the purpose of using their name and credit to secure mortgages on various properties were also involved. In most of the transactions, the lending institutions were provided with an agreement of purchase and sale reflecting only the final price, but were given nothing to indicate that there was a flip. Although one of the recruited lawyers testified that she expressed concerns to Poonai concerning the increase in value of the property in one day, he allayed those concerns by telling her that it was not illegal and that the Law Society said that there was no problem.

The result

Poonai was convicted of fraud and has been disbarred. What about the recruits? One has been disbarred and the other allowed to resign. Neither will practise again. Lawyers cannot be passive and turn a blind eye to activities around them. The reasons in the Poonai decision remind all lawyers that recklessness and wilful blindness are tantamount to dishonesty.

An accused is reckless when he or she is knowingly careless with respect to the occurrence of an element of the *actus reus*. Recklessness "is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal laws, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance." There is an element of the subjective in that an accused must have knowledge that such conduct may involve a consequence or a circumstance that constitutes or forms part of the *actus reus* of an offence. See *R. v. Sansregret*, [1985] S.C.J. No. 23 at para. 16.

Wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth: "... where an accused is aware that certain facts may exist which would make his actions criminal but deliberately refrains from making inquiries so as to remain ignorant." Where the accused suspected the fact, realized the probability, but refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge, wilful blindness is made out. See *R. v. Sansregret*, [1985] S.C.J. No. 23 at paras. 21-22 and *The Zamora No. 2*, [1921] 1 A.C. 801 (P.C.)

What about the money? No one knows where the money has gone. If the losses to the lender were title insured and the loss arose out of title fraud, the title insurers would pick up the loss to the lender. If the losses arose strictly out of value fraud, most title insurers would not be involved although that could depend, if the insurer's policy includes legal services coverage. If the lawyers were negligent, the LAWPRO policy would pay the loss, but in cases in which lawyers are wilfully blind or so reckless as to be dishonest, coverage under the policy is denied.

The lesson

The lesson is obvious. Don't be a dupe. To read the Poonai decision, see www.canlii.org/en/on/onsc/doc/2006/2006canlii43618/2006canlii43618.html.

*Caron Wishart is vice-president, Claims, at LAWPRO.
Debra Rolph is director of Research at LAWPRO.*