

# CLIENT LUNCH COMES BACK TO BITE

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By Melissa Fenton and Craig Holland

In May 2015, Justice Garling of the Supreme Court of NSW delivered judgment in *Abu-Mahmoud v Consolidated Lawyers Pty Ltd* [2015] NSWSC 547, finding a solicitor liable for \$2.3M in damages for providing negligent corporate restructuring and tax advice during two client lunches.

## Background

The plaintiff alleged he met the solicitor at a restaurant on two occasions to obtain legal advice in relation to avoiding any personal liability to the ATO.

The plaintiff's full financial arrangements were complex. Relevantly, the plaintiff's various companies, including Fairchild Developments Pty Ltd (Fairchild) whose major asset was a shopping complex (Fairfield property), had borrowed several million dollars from St George Bank. The loan was secured in part by the plaintiff's personal guarantee.

It was alleged the solicitor advised the plaintiff and his business partners they should incorporate a new company and:

- the new company should purchase the Fairfield property at the lowest possible commercial price from Fairchild;
- the plaintiff and partners should resign as directors of Fairchild and appoint a director 'who has nothing to lose';
- the \$400,000 tax liability would remain with Fairchild; and
- the new director should place Fairchild into voluntary administration and then liquidation. Fairchild would be wound up with the tax liability outstanding, and the liability would be avoided.

There were significant problems with the advice. One was that the ATO had the power to issue notices to the plaintiff and his partners making them personally liable for the tax liability.

The second major problem was that the appointment of a liquidator to Fairchild was an event of default under the terms of its loan agreement with the bank. The effect of default was that the loan balance became payable immediately.

## Snapshot

- Resist offering advice in a social setting.
- Professional negligence claims are immensely difficult to defend in the absence of contemporaneous records.
- Keep client lunches focused on building relationships not taking instructions or providing advice.

Fairchild exchanged contracts on the Fairfield property with the new company. The plaintiff and partners vacated their positions as directors of Fairchild and Fairchild was placed into voluntary administration. As the voluntary administration was an automatic event of default, the bank appointed receivers and managers over Fairchild.

Numerous issues plagued the sale of the Fairfield property and the sale eventually fell through, with the property being sold to another party for less than the amount outstanding on the loan. The plaintiff's personal guarantee was called upon to satisfy the outstanding amount. The plaintiff claimed against the solicitor, alleging he provided negligent advice.

## Solicitor denies restructure advice

The plaintiff's evidence and the solicitor's evidence recounted two very different versions of events. The plaintiff asserted the solicitor provided the advice over lunch at the meetings in a restaurant. The solicitor denied giving the advice at all and denied a retainer to advise on issues relating to the restructuring of Fairchild.

It was uncontested that the solicitor had acted for the plaintiff in various matters over time, including leases for the Fairfield property and the attempted sale of that property. Against this background, the solicitor had major difficulty leading evidence limiting the nature and scope of his retainer and the advice that he did or did not provide. The difficult task was made

even more so by the absence of any contemporaneous notes. His Honour Garling J was reluctant to accept the solicitor's evidence in the absence of contemporaneous records and ultimately found he could not accept the solicitor's evidence unless it was 'independently corroborated or else is a statement against his own interest.' Judgment was entered in favour of the plaintiff.

## Significance of keeping records

This decision reinforces the courts' general attitude towards a solicitor's failure to keep contemporaneous records of advice and instructions. The court has repeatedly expressed that documenting instructions and advice given is a task expected of the ordinary prudent solicitor. In this case, the fact that the meetings took place in a restaurant no doubt contributed to the lack of file notes. His Honour Garling J's opening remarks (at [9]) summarise his views:

'That such a significant sum of money by way of claimed damages could turn on two such meetings of which there is no contemporaneous note, is surprising. Whilst it may be congenial, informal and relaxing for a solicitor to meet with a client in such circumstances, this case demonstrates the pitfalls of attempting to provide serious advice about serious matters in such a setting.'

## Risk management

This decision highlights the importance for solicitors to take instructions and give advice in a professional setting, so as to ensure the instructions obtained and advice given can be properly documented and recorded.

In the absence of a contemporaneous record, it is immensely difficult for a solicitor to defend allegations that may be made about advice given or instructions received. This risk befalls all solicitors that may be tempted to provide advice in social settings. Issues of the solicitor's retainer and advice given or not given can cause expensive and time consuming disputes, as demonstrated in this case. **LSJ**

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