

CLARIFYING YOUR (EVOLVING) RETAINER

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Solicitors are rarely sued for 'getting the law wrong'. Instead, the root cause of the claim is more likely to involve a failure in communication. In many cases, this is caused by misalignment between the solicitor's understanding of his/her retainer and the client's expectations.

Cost agreements

The retainer agreement is the best evidence of the parties' intention and the client's instructions at the time the scope of the work was agreed to between the solicitor and the client. Careful drafting of the retainer can assist in minimising the risk of a professional negligence claim. The retainer can be a separate document but often the retainer agreement can be found within the body of the cost agreement. While a solicitor is not obliged to provide a cost agreement in matters where fees are less than \$750, it is good practice to always have a retainer agreement, even for 'low fee' matters.

Solicitors can be exposed when acting in cases involving low fees, as there can be a tendency to cut corners with documentation. Where there is no written retainer agreement there may be no contemporaneous evidence of the instructions received by the solicitor and any agreed limits on the scope of the solicitor's work.

One example concerns a claim against a solicitor involved in the purchase of land which was later discovered to be zoned non-residential. The solicitor said that he was retained to do the bare minimum in the conveyance and that he advised the client to carry out council searches to check that a dwelling could be built on the land. He received modest fees for the transaction and believed his client was better off carrying out his own council searches. The client, however, said he had no recollection of receiving advice about the importance of the searches which he did not obtain. He later brought a claim against the solicitor when he discovered that he was not entitled to build a dwelling

Snapshot

- A court may be reluctant to interpret the terms of the retainer narrowly unless there is clear evidence this was agreed to by the client.
- Whether your retainer agreement is a separate document or contained within your costs agreement, it should be the best evidence of the extent of your retainer.
- Where you agree to act only on a narrow aspect of a matter, ensure this is clearly documented. Documenting what is not within the retainer can be just as important as documenting what is in the retainer.
- When instructions in a case evolve beyond what was originally anticipated when you were first retained, revise the retainer agreement and confirm this with the client.

on the property, and he alleged his solicitor was negligent for failing to clarify the importance of the searches and the implications of not investigating the zoning. A retainer document which demonstrated that the responsibility for obtaining the searches fell on the client could have enhanced the solicitor's prospects of defending that aspect of the claim.

Documenting 'done deals'

Another common difficulty occurs when the solicitor believes s/he is being retained only for the purposes of giving effect to a 'done deal', which might involve the settlement of a dispute, the development of a building site, the terms of an agreement etc. In these cases the solicitor is of the view that s/he is only being retained to document

the 'done deal' and not to advise on the deal. However, if the arrangement sours, the client might bring a claim based upon an alleged failure to advise of the potential consequences of the deal, or related issues such as financing, in circumstances where the solicitor wasn't aware this advice was being sought. The risks are greatly increased where the solicitor is acting on instructions from both parties in documenting the deal, particularly if there is no written evidence demonstrating that the solicitor recommended that both parties obtain independent legal advice.

Vulnerable or unsophisticated clients

The courts are more likely to infer additional duties when a solicitor knows a client is in a position of vulnerability, where a transaction appears to offer no benefit to the client, or where the solicitor has background knowledge of relevant financial circumstances through acting for another interested party (see eg *Provident Capital Ltd v Papa* [2013] NSWCA 36).

A clearly documented retainer that describes the limits of any advice to be provided (and, if appropriate, that recommends independent advice) provides clarity for the client and makes it less likely a court will infer additional duties in any later claim against the solicitor. In some cases involving high risk transactions and vulnerable clients, the best option will be to decline acting altogether, particularly if there is any potential appearance of conflict of interest between clients or former clients.

Evolving retainers

Another area of exposure occurs where a matter that initially appears to be straightforward evolves into something unusual or complex, and the client later alleges the solicitor failed to advise in relation to other aspects of the transaction or matter. The solicitor may seek to defend such allegations by

arguing that the ancillary matters were not part of his/her retainer. In cases where there have been changes to the retainer it is wise to amend the retainer agreement so that the client is fully aware of the changing circumstances and there is documentary evidence of the evolved scope of the retainer. Where this evidence is not available, the court will need to make findings of fact based on the credit of the parties and also consider whether a prudent solicitor in that situation would have taken steps to clarify this issue.

In a recent example, a client engaged a solicitor to act in relation to the purchase of an interest in a hotel. The client subsequently entered into a partnership deed with one of the owners of the hotel. It also executed a Deed of Guarantee and Indemnity in favour of a lender who had advanced \$5 million to the existing owner. In later professional negligence proceedings against the solicitor, it was alleged the solicitor failed to advise the client of:

- (1) defects in the structure of the partnership; and
- (2) irregularities in the shareholdings of the vendor company following an

allocation of shares to the client which, the client asserted, could have been identified in a company search of the company obtained by the solicitor immediately before the client entered into the Deed of Guarantee.

The solicitor gave evidence that he was asked by the director of the client company to obtain the company search because this had been required for a separate financing transaction. However, the director of the client company alleged that he advised the solicitor he was about to sign the guarantee, and that the solicitor was negligent, after having obtained the company search, in failing to advise that the allocation of shares in the client's favour was in breach of the company's constitution and liable to be set aside. It was alleged that if the solicitor had advised his client of the irregularities in the company's shareholdings, the client would not have signed the relevant guarantee.

In this case the court preferred the evidence of the solicitor over the client and it found that no relevant advice was sought or given in relation to the company search and/or the guarantee. Ultimately the court's findings were

determined by a contest on the credit of the two relevant witnesses, as there was no available documentary evidence concerning the purpose for which the company search was obtained. Such evidence could have determined the issue much sooner, and could potentially have avoided lengthy and expensive litigation. **LSJ**

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