

Under the microscope - the breadth and nature of a retainer



The issue of a solicitor's retainer goes to the very heart of any professional negligence claim.

In a recent settled claim, the issue of the breadth and nature of the solicitor's retainer came under the microscope with potentially costly consequences for the solicitor. The solicitor advised the claimant in relation to his purchase of a business under a franchise agreement. The purchase was completed but the business subsequently failed with the claimant losing the purchase price and set-up costs as well as incurring a rental liability.

It was alleged that the solicitor had taken on a broad retainer to provide not only legal advice as to the terms of the franchise agreement, but also to provide advice as to the commercial viability of the business itself. It was further alleged that the solicitor had breached this broad retainer in failing to properly advise on both aspects. The client sought to make out a "no transaction" case, meaning that the client would not have proceeded with the transaction if proper advice had been provided by the solicitor.

If the allegations regarding the commercial viability of the agreement were proven there would have been an uninsured liability as Lawcover's policy excludes claims arising from financial advice.

The solicitor maintained that the retainer was limited to advising on the leasing arrangements and did not involve advice on the business or commercial viability of the franchise agreement. However, the solicitor's file did not contain clear documentation, such as a retainer agreement or file notes, that properly described the scope of the retainer. In the absence of such documentation or evidence, the client's case was plausible and the limited scope of the retainer would have been difficult to prove.

Given the uncertainties as to the solicitor's position on both liability and insurance coverage, the claim was ultimately resolved at mediation.

When advising on any matter solicitors should always:

- ▼ Carefully define, and properly document, their retainer with the client
- ▼ Ensure that any changes in the scope of the retainer are also carefully documented
- ▼ Ensure that advice provided does not constitute financial advice
- ▼ Maintain careful file notes of conferences with clients, particularly discussions about the scope of any advice given.

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