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Précis Paper

Negotiating and Evidence of a Legal Retainer

Our presenters are two of the most experienced practitioners involved in litigation concerning members of the legal profession. Their discussion on retainer is worth watching. I highly recommend this production of 48 minutes.

Discussion Includes

- The facts in *Richtoll Pty Ltd v WW Lawyers (in Liquidation) Pty Ltd* and the impact of this decision on solicitors liability and the retainer of solicitors
- The nature of the legal retainer; and
- Advice regarding negotiation of the terms of a retainer & evidence of it

Précis Paper

Negotiating and Evidence of a Legal Retainer

1. In this edition of BenchTV, Dominic Priestley SC (Barrister) and Robert Crittenden (Solicitor) discuss the recent decision of the New South Wales Supreme Court (Hoeben CJ at CL) in *Richtoll Pty Ltd v WW Lawyers (in Liquidation) Pty Ltd* [2016] NSWSC 438, The case concerned solicitor's liability and the nature of a retainer.

2. Mr Priestley SC and Mr Crittenden acted for the successful defendant to the proceedings, WW Lawyers.

Material Facts

3. The plaintiff, Richtoll, was a company engaged in a fledgling business as commercial lenders and sought lawyers to assist in this business. The company came into contact with WW Lawyers and discussions occurred as to the capacity of the firm to service Richtoll in their lending business.

4. In the ultimate proceedings, there was dispute as to precisely what was said in these preliminary meetings as well as whether and to what extent a retainer had been entered into.

5. The lender client contended that the defendant had communicated that the firm was able to fully service them in relation to: (1) sourcing clients, (2) assessing security; (3) assessing borrowers; and (4) providing the usual legal services in relation to relevant transactions. The defendant denied that the firm could or would provide services in relation to 'due diligence' or vetting the security and borrowers.

6. This became significant in the proceedings which followed two particular loans going bad and the discovery that the securities were insufficient. The loans that were the subject of proceedings were of $3 million for a property in Tamarama and $4.5 million for a property in Queensland.

7. In relation to the Tamarama loan, the borrower was a Mr Arslan who worked out of the offices of WW Lawyers and who was present at the initial discussions between Richtoll and the firm. Mr Arslan was held out as a business development manager and the precise relationship between WW Lawyers and Arslan became relevant to the proceedings. It was found that Richtoll should have known that Arslan was independent from the firm.

8. What transpired was that Arslan did not repay the loan and the property was eventually sold for less than the value of the loan. Thus, proceedings were commenced in order to seek compensation for the differential.

9. In relation to the Queensland loan, the loan was by way of second mortgage and it was not repaid. Furthermore, as a result of claims by the first mortgagee, no monies were recovered by the plaintiff lenders.

The Proceedings

10. Richtoll sought damages for professional negligence and breach of contract in relation to the services WW Lawyers provided regarding the loans. Specifically, it was pleaded in relation to both loans that WW Lawyers had failed to adequately assess the borrower's capacity to repay.

11. The two founders of the plaintiff company gave evidence in the proceedings. However, the court made adverse credibility findings against both witnesses. Conversely, the court made favourable findings regarding the principal of WW Lawyers.

12. The court found that there were separate retainers for each loan. Significantly, it was found that the retainers expressly excluded responsibility for due diligence. There remained a dispute as to whether the relevant letters were sent and received. However, the court found for the defendant, that they had indeed been sent and received, motivated by the credibility findings mentioned above.

13. In relation to the Tamarama loan, breaches of duty or retainer were not established and his Honour further remarked that even if they were, causation was not established.

14. In relation to the Queensland loan, breach was established. The defendant had checked the ASIC register in relation to the corporate borrower but there was a five week delay in the draw down period. After the five weeks, a receiver was appointed to the borrower and neither the plaintiff nor the defendant were aware, and the plaintiff alleged not checking the register again was sufficient to establish breach. They further argued that if they had been advised of the appointment they would not have loaned the money.

15. Expert evidence was led by both parties in relation to whether a second ASIC search constituted breach by way of experienced solicitors speaking to their practice acting for commercial lenders. The experts were divided in their written reports and met in the conclave. The defendant expert changed their view and tentatively agreed with the plaintiff's expert that allowing a period of 5 weeks prior to the draw down without checking the register was too long in light of the sums of money loaned. His Honour expressed confidence in the experts and found breach was thus established.

16. Section 50 of the *Civil Liability Act 2002* (NSW) provides a defence to claims in negligence in the following terms:

SECTION 5O:

Standard of care for professionals

(1) A person practising a profession ("a professional") does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.

(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

17. In order to raise this defence, it has to be pleaded and the defendant bears the onus of establishing it. Here, raising this defence was difficult given the expert evidence led in relation to breach. Nevertheless, both experts considered that, although it was negligent, a substantial number of lawyers would have allowed five weeks to go past without checking the register. His Honour found that there was a possibility that the practice was widely accepted but that this was not sufficient to make out the defence.

18. As breach was established in relation to the Queensland loan, it was necessary to consider whether causation was also established. Causation as an element of negligence actions is set out in s 5D of the *Civil Liability Act 2002* (NSW):

SECTION 5D:

General principles

(1) A determination that negligence caused particular harm comprises the following elements:

(a) that the negligence was a necessary condition of the occurrence of the harm ("factual causation"), and

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability").

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) *If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:*

(a) *the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and*

(b) *any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.*

(4) *For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.*

19. Ultimately, his Honour found that the plaintiffs had failed to establish causation because he was not satisfied that the plaintiffs would not have proceeded to lend the monies if they were informed of the receivership. This finding was largely based on his Honour finding that the lending business appeared to be in the nature of asset lending or acquisition loans even to the extent that the plaintiff lenders were looking for distressed loans. That is, they were not concerned that the borrower may have difficulty in repaying the loan, and that perhaps they may have even been hoping that the borrower could not repay the loan.

<u>The Retainer</u>

20. A solicitor's retainer is contractual in nature and therefore can lead to claims alleging breach. In order to establish a breach, one ordinarily looks to the words of a written retainer. However, retainers can also be found to exist without a written document by the conduct of the solicitor.

21. For example, in *Pegrum v Fatharly* [1996] 14 WAR 92 a party to a transaction was represented by solicitors whilst the other party was not. In the course of negotiations between the parties, discussions took place between the solicitors and the unrepresented party and the court found that the unrepresented party had effectively entered into a retainer with the solicitor.

22. Where a non-written retainer has been found, there is authority that the client's understanding of the terms of the retainer should be preferred to the solicitor because the solicitor is in a better position to protect themselves from liability. Thus the findings that the written letters were retainers was particularly important for the defendant to avoid liability.

23. The plaintiff had argued that the retainer did not adequately set out the terms of the retainer between the parties but the plaintiff was unable to point to steps they had taken to rectify the situation. This lack of action to rectify the documents allowed his Honour to find that the plaintiff had accepted the limited responsibilities listed in the written documents.

Solicitor's Liability

24. It has been contentious for some time as to whether the duties of a solicitor are solely set out within the retainer. Deane J, in *Hawkins v Clayton* (1988) 164 CLR 539, suggested that there was scope for finding that the duties of a solicitor could extend beyond those listed in the retainer. In *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 and *Winnote Pty Ltd v Page* (2006) 68 NSWLR 531, the contrary view was taken. More recently, the Court of Appeal has indicated that a solicitor is not safe to sit silently if they are satisfied they are discharging the specific words of the retainer.

25. In this case, the court found that solicitors acting for lending clients had an obligation beyond that contained in the retainer to ensure the "efficacy" of the security but not to "value" it. Valuation was considered to be a matter for the business judgement of the lender and independent advice.

26. The relevance of extended obligations beyond the retainer arose in relation to the Tamarama loan because WW Lawyers were aware that Arslan was struggling to make repayments on an existing loan and the question arose as to whether they should have informed the plaintiff of this.

27. The court found there was no extended obligation to inform the plaintiffs in reliance on similar decisions in the English decision of *National Home Loans Corp plc v Giffen Couch & Archer (a firm)* [1997] 3 All ER 80 and *Kayteal Pty Ltd v John Joseph Dignan* [2011] NSWSC 197.

Implications

28. This case highlights that plaintiffs often do not consider the issues raised by establishing causation in professional negligence disputes such as this. Mr Priestley SC argues that this may be because the layperson considers that professionals ought to solve their every problem when in fact the retainer will often only guarantee that the professional will do their best to manage the outcomes facing their clients.

29. Solicitors should provide retainers in writing and clearly specify what services they will and won't provide. However, it is also important that discussions occur from the outset that also reflect the contents of the retainer. In this regard, some foresight should be applied to determining matters that clients might consider are obligations of the solicitor and these should be discussed and the conclusion committed to writing.

30. Furthermore, solicitors should consider carefully whether actions they agree to embark on that are outside the ordinary practice of solicitors (but are usually undertaken by accountants) are within the coverage of their professional indemnity insurance. It should

further be noted that current standard form professional indemnity insurance in NSW contains a specific exclusion in relation to the provision of “financial services”.

BIOGRAPHY

Dominic Priestley SC

Senior Counsel, New Chambers, Sydney

Dominic Priestley was admitted as a Solicitor in 1991 before being called to the NSW Bar in 1995 and appointed a Senior Counsel in 2015. He is entitled to practice in all Australian jurisdictions.

Robert Crittenden

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Robert Crittenden was admitted as a Solicitor in 1987. He is a New South Wales Board Member and Chair of the Liaison Sub-Committee for the Australian Insurance Law Association (AILA) and is a member of the Product Liability Law Association.

BIBLIOGRAPHY

Focus Case

Richtoll Pty Ltd v WW Lawyers (in Liquidation) Pty Ltd [2016] NSWSC 438

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_22-04-2016_insurance_banking_construction_government.pdf

Judgment Link

https://www.caselaw.nsw.gov.au/decision/570f1fffe4b05f2c4f04cf0d

Cases

Hawkins v Clayton (1988) 164 CLR 539
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Legislation

Civil Liability Act 2002 (NSW)