

# PROPERTY LAW 2011

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## *Where it can go wrong for lawyers – professional responsibilities and liabilities*

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- 1 Lawyers who act for clients in property transactions may be exposed to a myriad of professional liability risks. A risk may be realised as a liability to pay damages or its analogue in equity, equitable compensation. Even an unmeritorious claim will expose the property law lawyer to time consuming and costly litigation.
- 2 I will speak about the legal framework from which risks may arise and give some examples of cases to illustrate the practical consequences for lawyers when things go wrong. I will not speak about the potential for disciplinary proceedings for breach of a professional obligation.

### **Legal framework**

- 3 The common law, equity and statutory law impose a number of obligations on lawyers when they carry out legal work.
- 4 The law of tort and the law of contract may impose on a lawyer an obligation to exercise reasonable care. The law of equity imposes fiduciary obligations. Statutory law,

including the *Competition and Consumer Act 2010* (formerly called the *Trade Practices Act 1974*) (Cth) and the *Fair Trading Act 2010* (WA), impose an obligation not to engage in conduct that is misleading or likely to mislead. Breach of one of these obligations may result in a liability to a client, or in some cases to a third party, to pay damages or other compensation.

#### *Primacy of the retainer*

- 5 In some circumstances the liability rules in one area of the law may affect the outcome in another. Importantly, the nature and terms of the retainer between the lawyer and the client may be paramount. It can influence the ambit of what is required in the exercise of reasonable care under a duty in tort as well as the ambit of the obligation of the lawyer as a fiduciary. It may also have a bearing on whether a lawyer has engaged in misleading conduct.
- 6 If there is one lesson to learn from the discussion that follows it is the vital importance of clarifying and confirming in writing the nature and ambit of what the lawyer has been instructed to do. A well drafted retainer might also expressly set out what the lawyer has not agreed to do.

#### *Duty of care*

- 7 The nature of the relationship between lawyer and client attracts an obligation of reasonable care under the law of tort.
- 8 In *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 Malcolm AJA at 53 said:

“Both barristers and solicitors owe a duty of care to those whom they advise or for whom they act. In the present context, their duty is to exercise reasonable care and skill in the provision of professional advice. The standard of care and skill is that which may be reasonably expected of practitioners.”
- 9 The obligation of a professional person, including a solicitor, has often been expressed more elaborately as one to exercise due care, skill and diligence, bringing to the task in hand the confidence and skill usually employed among solicitors practising their

profession and taking proper care in what they do: *May v Mijatovic* [2002] WASC 151 [89].

- 10 There is a concurrent obligation in contract that is implied into the contract between the lawyer and the client for provision of professional services. A contract of professional services includes an implied term of reasonable care that arises by operation of law. It is a term that the parties can, and often do, bargain away: *Astley v Austrust* (1999) 197 CLR 1, 22 [47]. The implied term, if not bargained away, requires that the services will be performed with reasonable care and skill: *ibid* 23 [48]. There may be a corresponding duty of care owed in tort requiring the professional person to exercise reasonable care and skill: *ibid*.
- 11 In theory a lawyer can agree a retainer under which an obligation to exercise reasonable care, whether in tort or contract, has been expressly excluded. The ambit of the task required of the lawyer can be limited by the terms of the retainer. Accordingly the lawyer might in such a case have a restricted obligation of care, restricted to exercising care only in respect of performance of the agreed task. The absence of clear agreement as to what the lawyer is required to do can result in a wide ranging obligation to exercise care that extends beyond being careful in performing the agreed task and may include advising on risks associated with the transaction.
- 12 Lawyers are not however required to give advice about business risks unless they agree to give that advice.

*Expert evidence*

- 13 It does not appear to me to be well recognised that there is very limited scope for defending a claim against a lawyer by relying on seemingly “expert” evidence from another lawyer who practices in the same field.

- 14 On the question of what might reasonably be expected of a solicitor in a particular case expert evidence might be relevant and admissible but ultimately it is for the court to determine what was the appropriate standard of care and whether, in the relevant case, the conduct did not comply with that standard: *Heydon v NRMA Ltd* 55 [152] per Malcolm AJA. Usually the evidence of another lawyer about the quality of the work done by the defendant is not admissible. A lawyer cannot give evidence merely asserting what another lawyer should have done, or what the particular apparent “expert” would have done, in the same situation as the defendant.
- 15 Evidence from another lawyer might be admissible if it is confined within very strict limits. These limits were articulated in the New South Wales case *Lucantonio v Kleimert* [2009] NSWSC 853. In short, what is permitted is evidence of professional standards, against which the defendant lawyer’s conduct may be compared.
- 16 In *Lucantonio v Kleimert* the plaintiff claimed damages in negligence against an architectural consultant, a solicitor, and a barrister. Brereton J identified a number of authorities on the question of admissibility of expert evidence on professional standards and distilled the following principles at [8]:
- “(1) In a professional negligence case, expert evidence is admissible of an accepted or standard professional practice, conduct or standard. Expert evidence is also admissible of what is commonly considered professional practice of competent and careful professionals in the field.
  - (2) Expert evidence is not admissible of what the expert would himself or herself have done in the circumstances, at least if that evidence is tendered to support the inference that other careful and competent professionals would have done the same things professionally; nor is expert evidence admissible of what as a matter of law reasonable care is required; that is a question of law for the Court and not for an expert.
  - (3) Expert evidence of what a competent and prudent practitioner would have done in the particular circumstances of the defendant is not admissible if, in effect, it is no more than one professional commenting on the conduct of another, at least in the absence of evidence that the expert has additional training, study or experience to demonstrate the acquisition of specialist knowledge of what a competent and prudent practitioner would do. However,

expert evidence of what a competent and prudent practitioner would have done in certain circumstances may have been admissible if the witness has by training or experience such additional special qualifications or experience as to equip him or her to give evidence with competence of what the general body of competent and general practitioners would do.

- (4) Where the expert witness does not sufficiently state the assumed circumstances of the defendant's position on which the opinion is based, that may impact on the fairness to the defendant of admitting the evidence to such an extent as to warrant its rejection under (NSW) *Evidence Act* 1995, s 135, even if it is technically admissible.
- (5) In any event, the expert must furnish the Court with criteria enabling the evaluation of the expert's conclusion, including its essential integers and rationale.
- (6) Where the professional field in question is that of law, expert evidence is not essential to making (or for that matter defending) a case of professional negligence, because the Court itself is sufficiently equipped to form an opinion about legal practice unaided by expert opinion. That is not to say that such opinion is inadmissible in such a case; to the contrary, it is admissible, but even where adduced it is not conclusive, and the Court is entitled to decide the case contrary to expert evidence where appropriate to do so."

See also see *Cross on Evidence*, (7<sup>th</sup> Aust Ed) [29125] and *Permanent Trustee Australia Ltd v Boulton Permanent Trustee Australia Ltd* (1994) 33 NSWLR 735.

#### *Fiduciary duty*

17 Apart from trustees and beneficiaries there are classes of persons who normally stand in a fiduciary relationship to one another. They include partners, principal and agent, director and company, employer and employee, and solicitor and client: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 68 per Gibbs CJ, 96 per Mason J. The critical feature of fiduciary relationships may be that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one that gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that

other person who is accordingly vulnerable to abuse by the fiduciary of his position:  
*Hospital Products* 96-7 per Mason J.

- 18 Fiduciary obligations are proscriptive, rather than prescriptive, in nature and the duties imposed do not include positive legal duties to act in the best interests of their principals:  
*Breen v Williams* (1996) 186 CLR 71, 113, 137-138; *Pilmer v Duke Group Limited (In Liq)* [2001] HCA 31, (2001) 207 CLR 165, 197-198 [74]; *Townsend v Roussety & Co (WA) Pty Ltd* [2007] WACA 40 [128], (2007) 33 WAR 321.
- 19 The fiduciary proscriptive obligations are not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict of personal interest and duty. If the obligations are breached the fiduciary must account for any profits and make good any losses arising from the breach: *Breen v Williams* 113; *Pilmer v Duke Group* 198 [75].
- 20 Apart from remedies of constructive trust or account a fiduciary may be liable to pay equitable compensation for loss that results from breach of fiduciary duty.
- 21 The common law requirement that losses be caused by the breach of duty, applying the common sense approach to causation, does not apply to a claim for equitable compensation. Rather, in equity, the inquiry in each instance appears to be whether the loss would have happened if there had been no breach: *Re Dawson* [1966] 2 NSW 211, 214-5; *Hill v Rose* [1990] VR 129.
- 22 A solicitor has obligations in equity that arise out of the fiduciary nature of the relationship between the solicitor and the client. The solicitor has a fiduciary duty not to prefer his or her interests or another person's interests to those of the client.
- 23 A lawyer who breaches a fiduciary duty owed to a client will be exposed to equitable remedies including equitable compensation.

*Misleading conduct*

- 24 It is possible that legal advice that is given in connection with a commercial transaction might be viewed as advice given in “trade or commerce” exposing the solicitor who gave the advice to a claim for damages for breach of the *Competition and Consumer Act 2010* (formerly called the *Trade Practices Act 1974*) (Cth) or the *Fair Trading Act 2010* (WA): cf *Bond Corporation Pty Ltd v Thiess Contractors Pty Ltd* (1987) 14 FCR 215.

**Examples of cases against lawyers**

*Breach of duty of care*

- 25 *Capebay Holdings Pty Ltd v Marks Healy Sands* [2002] WASC 287 provides an example of how risk of liability, and liability, can arise where terms of retainer are not clearly and specifically articulated and agreed. A lawyer may be required to give advice as a task outside the scope of work the lawyer might have thought he or she agreed to do. The problem in the case was exacerbated by delegation of the professional task to an employed lawyer.
- 26 Capebay contracted to buy the Wembley Shopping Centre. The Wembley Shopping Centre land was adjacent to the Wembley Hotel. Part of the shopping centre building encroached on the Wembley Hotel land. After it agreed to buy the shopping centre Capebay agreed to buy the Wembley Hotel land, but did not settle under that contract because it did not secure approval for finance. It later bought the Wembley Hotel land at a higher price.
- 27 Encroachment would not have been an issue if Capebay bought both properties at the same time and settled the sales at the same time. Capebay would have paid less if it had settled the earlier contract.

- 28 After it finalised its purchases of both properties, Capebay claimed damages from its lawyers and alleged that it should have been advised about the encroachment and the financial consequences of the encroachment.
- 29 The lawyers were engaged to act for Mr Lee for the acquisition of the Wembley Shopping Centre land. Instructions were first given at a meeting between Mr Lee and Mr Marks during which Mr Lee asked Mr Marks to act for him in relation to purchase of the Wembley Shopping Centre. Words were spoken to the effect that the lawyers would be paid \$5,000 for all work in connection with the acquisition of the shopping centre including lease examinations and carrying out items of work on a list that was handed to Mr Lee during the meeting but which did not exist at the time of trial.
- 30 The instructions and what the lawyers agreed to do were not reduced to writing. The trial judge held that the lawyers agreed that they would peruse any relevant documentation and act for and advise Mr Lee generally in relation to the purchase of the Wembley Shopping Centre land in consideration of a fee of \$5,000 plus disbursements. This was a very general and somewhat vague retainer.
- 31 Subsequently a Mr Lim telephoned Mr Marks and asked him to act for a Lee company called Everland in relation to the purchase of the Wembley Hotel.
- 32 Mr Lee signed a contract to buy the Wembley Shopping Centre land. Although it was part of the plaintiff's case at trial that it was not told about the encroachment, the trial judge held that when Mr Lee signed the contract to buy the Wembley Shopping Centre land he knew that the Wembley Shopping Centre building encroached on the Wembley Hotel land.
- 33 Before a contract was entered into to buy the Wembley Hotel land Mr Marks handed over the conduct of the file to an employed solicitor. Neither Mr Marks nor the



employee gave advice to Mr Lee or Capebay about the financial consequences of the encroachment.

- 34 The trial judge held that a solicitor's duties depend upon the terms and conditions of the retainer and any duty of care to be implied must be related to what the solicitor is instructed to do. Within the terms of the retainer a solicitor owes a duty of care to whom the solicitor advised or acted and the duty was to exercise reasonable care and skill.
- 35 The trial judge held that the fulfilment of the solicitor's duty was not necessarily confined to carrying out the client's specific instructions. There was a duty to protect the client from a real and foreseeable risk of economic loss by giving it appropriate advice and, if necessary, initiating action to guard against economic loss. A solicitor acting for the buyer of property was paid not only for what the solicitor in fact did, but also for the responsibility the solicitor assumed in trying to protect the client from financial loss if things went wrong. A solicitor had a duty to warn a client of a material risk inherent in the proposed purchase.
- 36 Issues arose about the scope of the retainer.
- 37 Marks Healy Sands contended at trial that it contracted to act as solicitors for the first company that was introduced to it by Mr Lee, called Everland. The trial judge however found that it agreed to act for Mr Lee or any company used as a vehicle for the acquisition of the Wembley Shopping Centre land and later the Wembley Hotel land. Accordingly in the view of the trial judge all advice given and the duty to give advice and act was advice given or duty owed to whichever corporate vehicle was employed by Mr Lee.
- 38 The lawyers contended that the retainer was limited to "negotiate the contract terms, peruse lease agreements, undertake title searches, prepare transfer of land documents, arrange payment of duty, correspond with the City of Perth in relation to reciprocal

parking rights and correspond with the vendor's solicitors". It denied that it was obliged to advise about the legal effect or financial consequences of the encroachment.

- 39 The trial judge disagreed and found that Marks Healy Sands was obliged to warn the plaintiff of material risks inherent in the transaction unless it knew that the client was already aware of those risks.
- 40 On the question of the standard of care required of a property lawyer, the trial judge held that there was a difference between the way advice was given to an experienced client and to a client completely inexperienced in the type of transaction in respect of which a solicitor was retained. For example, a solicitor retained by a bank in a mortgage transaction should give advice in a much different way from the advice given to a person who had never before been involved in a mortgage transaction. A solicitor acting for a bank may simply have to tell the bank that there was a caveat protecting another interest in property over which the bank was to take security. That advice and a copy of the caveat may be sufficient to inform the bank of a prior interest and the consequences. However a solicitor acting for a completely inexperienced person might have to start by explaining what a caveat was, how it operated, how it might be removed and what the effect of a claimed prior interest would be on that person's security.
- 41 The trial judge held that a reasonable person in the position of Marks Healy Sands should have provided advice about the consequences of the encroachment when the possibility developed in the history of the transactions for purchase that the contract to buy the Wembley Shopping Centre land might proceed but the Wembley Hotel land contract might not.
- 42 He found that Marks Healy Sands was negligent in failing to advise Capebay about the consequences of any encroachment. The advice that should have been given was that there was a risk that the owner of the Wembley Hotel land could exclude the tenants on

the encroaching land from going to their buildings, those tenants could then sue Capebay for damages for breach of the covenant of quiet enjoyment, proceedings might have to be taken under s122 of the *Property Law Act 1969*, relief under that section might result in the plaintiff having to pay damages or money to the owner of the Wembley Shopping Centre land, and that to avoid all of those consequences money might have to be paid to the owner of the Wembley Hotel land and that at the least Capebay would be put to expense in conducting litigation and having surveys carried out.

- 43 The trial judge nevertheless held that the negligence did not cause any loss because Mr Lee knew about the encroachment and knew that he could be “held to ransom”. The trial judge held that nothing different would have occurred if the proper advice had been given. It would only have told Mr Lee what he already knew in general terms.
- 44 In this case Capebay attempted to adduce evidence from a senior Perth property lawyer about the conduct of Marks Healy Sands. The trial judge held that the evidence was inadmissible. The conclusions of the trial judge on negligence were not based on his acceptance of expert evidence.

#### *Fiduciary duty*

- 45 A local example of breach of this duty is *Pegrum v Fatharly* (1996) 14 WAR 92. In this case the obligations owed by solicitor to client arose from circumstances that fell short of an express retainer. The solicitor might have thought that the person to whom he was held to owe the duty was not his client. As this case shows, a retainer can be implied.
- 46 It is an example of a case where solicitors were held to have a duty to disclose information that was relevant to the client’s decision to proceed with the proposed transaction.

- 47 Fatharly was a solicitor. He had carried out work for Mr Wilkins. Wilkins and some of his companies paid Fatharly a monthly fee. Fatharly had previously advised Wilkins about an “overseas banking scheme” and had made enquiries about it.
- 48 Wilkins and his companies were in financial trouble. Wilkins sought loan funds from Pegrum. Wilson asked Fatharly to prepare the security documents. Wilkins and Pegrum attended a meeting with Fatharly. At the meeting Fatharly told Pegrum about the overseas banking scheme and by the end of the meeting had received instructions to prepare a number of security documents.
- 49 It was not part of Pegrum’s case at trial that there was an express retainer arising from express instructions that were given to Fatharly by Pegrum. Pegrum had not agreed to pay legal fees to Fatharly.
- 50 Despite these facts, on appeal the Court considered that a professional engagement may be implied. The court held that where both parties to a transaction consult the same solicitor and together give him the information needed to prepare the documents that set out their respective rights and obligations, in the absence of a clear indication by the solicitor that he does not accept one of the parties as his client there is a strong bias towards finding that the solicitor has agreed to act for both parties and to undertake the usual professional responsibilities to them both: 102.
- 51 It did not matter in that case that Fatharly was paid a monthly fee by Wilkins and some of his companies, had often acted for them in the past and would do so in the future, and had acted in connection with the overseas banking scheme. That did not make Fatharly the exclusive solicitor for Wilkins.
- 52 Generally speaking there was no such thing as a client’s solicitor. At 104 Anderson J quoted from Oliver J in *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] Ch 384, 402 “the expression “my solicitor” is as meaningless as the expression “my tailor”

or “my bookmaker” in establishing any general duty apart from that arising out of a particular matter on which his services are retained”: 104. The Court considered that it was immaterial that Wilkins was to pay Fatharly’s fees for the work: 105.

53 The Court, without articulating the nature of the duty owed by Fatharly as a fiduciary, considered that by undertaking to act for both parties Fatharly was in a position of “hopeless conflict between his duty to the lender and his duty to the borrower”: 105-106.

54 The Court confirmed that the ambit of a solicitor’s duty depends on the term of the retainer and that solicitors do not give business advice or valuation advice in the ordinary course: 106. However where a solicitor knows or has reason to suspect that the borrower may be insolvent or that the securities he has been asked to prepare may be inadequate from point of value it is his duty to so advise his client: 106-107.

55 Fatharly was held to know or suspect that Wilkins and his companies were in a bad financial position and that the “overseas banking scheme” was for Wilkins’ group the last role of the dice. He had a duty to make full disclosure to Pegrum which he did not do. Fatharly had a duty to advise Pegrum of the bad financial condition of Wilkins and his companies and of the inadequacy of the securities being offered to secure repayment of the loan: 107.

56 Pegrum sustained a loss by reason of monies advanced to Wilkins and having given a mortgage over their home to secure money advance by a third party to one of Wilkins’ companies. The court appears to have awarded the amount of the loss to Pegrum as equitable compensation for breach of fiduciary duty.

## **Conclusion**

57 A number of lessons emerge from this review of a limited number of cases.

58 First, a legal retainer should be put in writing.

- 59 The written retainer should spell out exactly what the lawyer has been asked to do and what he or she has agreed to do. It should make clear who the client is. In some instances it may be necessary to clearly tell a person that he or she is not the lawyer's client.
- 60 The terms of the retainer, including the limits of the agreed professional task, should be set out with clarity. The found agreed retainer in *Capebay*, that the lawyers would peruse any relevant documentation and act for and advise Mr Lee generally in relation to the purchase of the Wembley Shopping Centre, was too broad and vague. It permitted the Court to find that the lawyers were required to advise on economic risks.
- 61 It might be appropriate to spell out in a written retainer what the lawyer has not agreed to do. This may be important where work, as was the case in *Capebay*, will be carried out for a fixed sum. There may be risks associated with the transaction about which a lawyer could give advice if instructed to do so or, in the absence of limiting terms, if required to do so in the exercise of reasonable care under the wording of the retainer.
- 62 The terms of the retainer should be sent to the client, and preferably a copy should be signed by the client.
- 63 If an employed solicitor takes over the entire conduct of the matter, he or she should be told the terms of the retainer. The employed lawyer needs to know the scope of the agreed professional task.
- 64 Once the retainer has been agreed it should be carried out according to its terms and, within the framework of those terms, reasonable care should be exercised.
- 65 In addition if the lawyer knows, or comes to know of, information that is relevant to the client's decision to proceed with the transaction that information should be disclosed to the client. Disclosure should not occur if advice of that kind has been expressly excluded by the terms of the retainer. In addition, if disclosure would put the lawyer in breach of a

duty owed to another person the lawyer should not disclose the information and should cease to act for the client.

- 66 The consequences of failing to apply these lessons may include incurred liability to pay money and/or the inconvenience, professional embarrassment, and costs of defending litigation.

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