A Solicitor's Duty of Care: A penumbral duty of care still doubtful but advice on appurtenant legal risk required

22 June 2016

The following words of Oliver J in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (A Firm)* [1979] 1 Ch 384 are often cited in Australian jurisdictions as the authority for the proposition that there is no such thing as a general retainer in the sense of a duties which go beyond the scope of what a solicitor is requested and undertakes to do [i]:

> There is no such thing as a general retainer in that sense. 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 in which his services are retained....The extent of his duties depends upon the terms and limits of that retainer and any duty of care to be implied must be related to what he is instructed to do. Now no doubt the duties owed by a solicitor to his clients are high, in the sense that he holds himself out as practising a highly skilled and exacting profession, but I think that the court must beware of imposing upon solicitors or upon professional men in other spheres – duties which go beyond the scope of what they are requested and undertake to do.

Recently, Gageler J helpfully summarized the law on a solicitor's duty of care in *Badenach v Calvert* [2016] HCA 18 at [57] as follows:

> Subject to statutory or contractual exclusion, modification or expansion, the duty of care which a solicitor owes to a client is a comprehensive duty which arises in contract by force of the retainer and in tort by virtue of entering into the performance of the retainer (Cf *Astley v Austrust Ltd* (1999) 197 CLR 1 at 22-23 [47]-[48]; [1999] HCA 6; *Voli v Inglewood Shire Council* [1963] HCA 15; (1963) 110 CLR 74 at 84-85; [1963] HCA 15.). The duty is to exercise that degree of care and skill to be expected of a member of the profession having expertise appropriate to the undertaking of the function specified in the retainer (*Heydon v NRMA Ltd* [2000] NSWCA 374; (2000) 51 NSWLR 1 at 53-54 [147], 117 [362]; *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR 479 at 483; [1992] HCA 58.). Performance of that duty might well require the solicitor not only to undertake the precise function specified in the retainer but to provide the client with advice on appurtenant legal risks (*Heydon v NRMA Ltd* [2000] NSWCA 374; (2000) 51 NSWLR 1 at 53-54 [147]; *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR

479 at 483.) Whether or not performance of that duty might require the solicitor to take some further action for the protection of the client's interests beyond the function specified in the retainer is a question on which differences of view have emerged (Eg *Hawkins v Clayton* (1988) 164 CLR 539 at 544-545, 579-580; [1988] HCA 15; *Kowalczuk v Accom Finance Pty Ltd* [2008] NSWCA 343; (2008) 77 NSWLR 205 at 263-270 [267]- [294]; *Doolan v Renkon Pty Ltd* (2011) 21 Tas R 156 at 166-168 [30]-[39]; *Takla v Nasr* [2013] NSWCA 435 at [68]).

Unfortunately, in Murdoch Clark Lawyers' (Badenach & Ors) successful appeal, it was not necessary for the High Court to determine the final question about a penumbral duty.

In *David v David* [2009] NSWCA 8 Allsop P (as he was then), with whom Hodgson J and Handley AJA agreed, said at [76] that although a "penumbral duty of care" was doubtful his Honour continued:

> "If, however, the solicitor during the execution of his or her retainer learns of facts which put him or her on notice that the client's interests are endangered or at risk unless further steps beyond the limits of the retainer are carried out, depending on the circumstances, the solicitor may be obliged to speak in order to bring to the attention of client the aspect of concern and to advise of the need for further advice either from the solicitor or from a third party."

So despite no "general retainer" existing and a penumbral duty of care being doubtful, a solicitor's risk management should include the following:

(a) An unequivocal and specific written retainer.

(b) Obviously the skilled and exacting performance of specified functions under such retainer.

(c) Processes for the early identification of appurtenant or incidental legal risks to the retainer.

(d) The provision of appropriate legal advice on appurtenant or incidental legal risks or at least informing the client in writing in a timely manner of the need for such further legal advice.

(e) If during the performance of the retainer, the solicitor obtains knowledge that the client's interests are endangered or at risk unless further action beyond the scope of the retainer is carried out, the client should be notified of the issue and the need for further advice or action either from the solicitor or from a third party.

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[i] See *Artistic Builders Pty Limited & Anor v Nash & Ors* [2010] NSWSC 1442 at [509]; Larsen v Lynch [2006] FCA 385 at [27]; *Edwards & Ors v Legalese Pty Ltd* [2012] SADC 95 at [316]; *Smith v O'Neill* [2014] NSWSC 1119 at [205] – [204].