THE SCOPE OF A SOLICITOR'S FIDUCIARY DUTY

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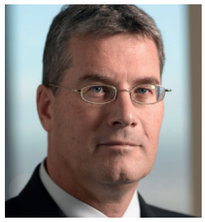

It goes without saying that the relationship between solicitors and their clients is a fiduciary one. Determination of the scope, content and duration of the fiduciary duty is not so straightforward.

What is often overlooked is that the fiduciary relationship does not arise merely by reason of the status of the relationship. It comes about due to what the solicitor agrees to undertake, or is deemed to have undertaken, on behalf of their client.

The significance of this distinction is that the scope, content and duration of the fiduciary duty owed by a solicitor needs to be ascertained by reference to the nature of the relationship between the solicitor and client, not its mere existence.

In the case of *Marshall v Prescott (No 3)* [2013] NSWSC 1949 (Marshall), the court was asked to consider the fiduciary duty owed by a solicitor to a former client. The case also raised questions as to the extent to which a solicitor's fiduciary duty survives termination of their retainer.

In addition to confirming the well-established principle that the fiduciary relationship between solicitor and client comes to an end with the termination of the retainer, the court was also required to consider the scope of a fiduciary duty in the context of an atypical solicitor and client relationship. In that regard it provides a useful vehicle to highlight the types of the matters a court will take into account when determining the scope of a solicitor's fiduciary duty.

The principles in *Beach Petroleum*

The decision in Marshall is best understood in the context of the principles set out in the case of *Beach Petroleum NL v Abbott Tout Russell Kennedy* [1999] NSWCA 408 (Beach Petroleum).

The High Court confirmed that the starting point was that the fiduciary duty did not arise merely due to the status of the relationship (at [188]). The fiduciary nature of the solicitor client relationship arose due to the element of confidence and influence inherent in the solicitor-client relationship (at [189]).

The significance of this is that a facet of the solicitor-client relationship that may be considered to be fiduciary in one case may not be considered to be fiduciary in another.

The extent of the fiduciary obligations owed is ascertained by the nature of the endeavour for which the relationship exists. This inquiry is not limited to the express agreement entered into by the solicitor and client, but also from the course of dealing actually pursued (at [194]). Until the content and duration of the duty is established, the question of whether there has been a breach of the fiduciary duty cannot be addressed.

In relation to a claim brought by a former client, there is no issue of the solicitor having a conflict of interest as the solicitor has no obligation to advance the interests of a past client. The fiduciary relationship between solicitor and client comes to an end with the termination of the retainer (at [205]).

The only component of the duty a solicitor owes to a former client that survives termination of the retainer is the duty to preserve the confidentiality of any information provided during the solicitor-client relationship (at [205]).

The principles set out in Beach Petroleum have been applied and followed in a number of cases in New South Wales.

The decision in *Marshall*

The Marshall case involved a somewhat convoluted factual history. For present purposes, the key facts, as found by the court, can be summarised as follows: the plaintiff in the proceedings, Margaret Marshall, was the wife of Neil Marshall. Neil Marshall was killed in an aircraft accident. At the time of his death, Mr Marshall was in a relationship with Linda Carruthers, while still being legally married to the plaintiff.

The plaintiff and her son were the sole beneficiaries of Mr Marshall's will. Sometime after the accident, the defendant solicitor commenced to act for the representatives of some of the people who died in the aircraft accident, including Ms Carruthers.

The solicitor contacted the plaintiff to ascertain whether she wished to join in litigation in the United States against companies responsible for the manufacture and installation of the engine in the aircraft. He was referred to other solicitors retained by the plaintiff.

From that time the defendant/solicitor played a co-ordinating role on behalf of his own clients and the legal representatives of other families of the victims of the crash in relation to the litigation in the United States.

Snapshot

- A fiduciary relationship does not arise merely by reason of the status of the relationship. It comes about due to what the solicitor agrees to undertake, or is deemed to have undertaken, on behalf of their client
- Until the content and duration of the duty is established, the question of whether there has been a breach of the fiduciary duty cannot be addressed
- It was found that, while the defendant owed a fiduciary duty to the plaintiff prior to termination of the retainer, the scope of the duty was informed by the limited role that he assumed on her behalf
- The extent of the fiduciary relationship depends, in part on the retainer. The retainer should be drafted carefully to ensure, so far as is possible, that the retainer is in place and clearly defined
- It is very unwise (as noted in the judgment) for a solicitor who is retained by multiple clients to act for one of the clients in a dispute between them

The litigation in the United States was met with some success. Unfortunately, a dispute arose between the plaintiff and Ms Carruthers as to who was entitled to receive the proceeds of the litigation. This dispute resulted in further litigation in New South Wales between the plaintiff and Ms Carruthers. The solicitor was restrained in those proceedings from assisting Ms Carruthers.

Ultimately, Mrs Marshall obtained consent orders that granted her the entire proceeds of the United States' litigation plus costs on a party/party basis. Ms Marshall then commenced proceedings against the solicitor seeking to recover the difference between the costs she paid and the amounts recovered from Ms Carruthers. She alleged that the solicitor breached various duties to her that resulted in the NSW litigation. The majority of the allegations against the solicitor related to alleged breaches of duties that occurred after the plaintiff's retainer was terminated.

The proceedings against the solicitor in Marshall were dismissed by the court. At the outset, the court confirmed the well-established principle that the fiduciary relationship between solicitor and client came to an end with the termination of the retainer, and that the only duty to the former client that survived the termination of the client relationship was a continuing duty to preserve the confidentiality of information imparted during the relationship (at [7, and 109]).

As such, the plaintiff's case in so much as it relied upon allegations of breaches of duty, that were said to have taken place after termination of the retainer could not succeed. Of particular interest in the case was the court's analysis of the scope of the fiduciary duty owed by the solicitor/defendant to the plaintiff during the period of the retainer.

In determining the content and scope of the fiduciary duty owed, the court looked to the written retainer and the course of dealing between the plaintiff and defendant. The following matters were considered by the court to be significant in defining the scope of the duty:

(a) The defendant was retained in relation to a number of specific matters (at [115]);

(b) The extent of the defendant's retainer in respect of the United States' litigation was that of a co-ordinator, he did not provide advice to the Plaintiff in respect of those proceedings (at [120]);

(c) The defendant was retained to act on behalf of a number of different parties (at [115]);

(d) The plaintiff knew that the defendant was also retained to act for Ms Carruthers (at [115] and [118]);

(e) The plaintiff placed constraints on the retainer, in particular by ensuring that the defendant was not provided with personal information (at [121);

(f) It was understood that other solicitors were acting for the plaintiff in respect of her disputes with Ms Carruthers (at [122]).

In light of the matters taken into account by the court it was found that, whilst the defendant owed a fiduciary duty to the plaintiff prior to termination of the retainer, the scope of the duty was informed by the limited role that he assumed on her behalf (at [1241).

The decision in Marshall is currently on appeal. It will be interesting to see whether the Court of Appeal will take this opportunity to clarify, or even depart from, the principles set out in Beach Petroleum.

Practical implications

While the claim against the defendant solicitor failed, Marshall's case provides an important reminder to solicitors of a number of key issues surrounding the solicitor-client relationship:

(a) The extent of the fiduciary relationship depends, in part on the retainer. The retainer should be carefully drafted to ensure, so far as is possible, that the retainer is in place and clearly defined.

(b) The duty to keep information provided during the life of the solicitor client relationship confidential survives termination of the retainer. Steps need to be taken to protect any confidential information provided.

(c) It is very unwise (as noted in the judgment) for a solicitor who is retained by multiple clients to act for one of the clients in a dispute between them (Marshall at [8]). Even though the only duty that survives termination of the retainer is the duty to maintain confidentiality, it is likely that a solicitor will be injuncted from continuing to act. **LSJ**