

Closed files, ongoing risks

By GREG COUSTON and NATALIE TRELOAR

Many practitioners will finish a matter and close their file with a strong sense of achievement and satisfaction; others might finalise a matter and close a file with an equally strong sense of relief. Generally speaking, when lawyers close a file, they anticipate that the client, or the transacting parties, will live happily ever after – but there are often occasions in which, after a file or matter has been closed, they are called upon to do further work or give further advice.

This can be a problematic time.

Conflict issues

It is not uncommon, particularly after commercial transaction files have been closed, for a client to require further advice from their lawyer about the meaning or interpretation of particular contractual provisions which had been previously drafted. The same might be true of settlement agreements which resolve litigation. In addition, a client who had previously been given advice about commercial options may wish to revisit that advice, potentially in the context of changed circumstances. Frequently the additional “after the event” work will be benign and uncontroversial – but there will be occasions when it is in a context which calls into question the correctness of a lawyer’s previous drafting or advice.

These circumstances can generate a conflict between a solicitor’s duty to their client and their own interests.

For example, a solicitor may have been involved initially in the drafting and finalisation of a commercial agreement, but the transacting parties later fall into dispute over the meaning of clauses which (with the benefit of hindsight) are ambiguous or defective, or arguably so. A solicitor may have given particular tax advice to a client in relation to the structure of its business affairs, but some time later the ATO challenges

the client’s arrangements in a fashion inconsistent with the advice. There may be instances where, over some period of time, a lawyer has advised a client about their remedies against a third party wrongdoer – but when proceedings are commenced on behalf of the client, the defendant wrongdoer pleads a limitations defence (involving a suggestion that the limitation period expired during the course of the solicitor’s retainer/advice).

In these type of instances, it will be necessary for the lawyer to consider whether they are in a position of conflict and, if so, how to manage that issue.

Assistance in subsequent disputes or litigation

There are, of course, instances in which completed and closed files will later generate litigation between the parties. In this context, the solicitor is often requested to provide ‘assistance’ in the context of the ongoing dispute.

Sometimes this assistance takes the form of a request that the solicitor provide an explanation concerning the background to the transaction, or the negotiation of documents. On occasions, the solicitor is asked to swear an affidavit, or give evidence about the events which transpired.

These circumstances raise different issues.

In recent years, we have seen a number of matters where the commercial transaction in which a solicitor had previously acted gave rise to litigation. Other lawyers were representing the client in the litigation – but the original solicitor was requested to give, and in fact did give, an affidavit concerning the prior events.

For any lawyer who is put in this position, it is essential to recognise that the affidavit needs (of course) to be precise and accurate, and that the preparation of a precise, accurate affidavit usually takes a considerable amount of time.



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If a solicitor takes a short cut in the preparation of their affidavit, they do so at their peril.

We have defended a number of solicitors against allegations of negligence in connection with commercial transactions – where the solicitor had also given a statement or affidavit before the negligence allegations had been raised.

In many of these cases, the solicitor had invested insufficient time in the preparation of the statement or affidavit to properly deal with their precise position, and the statement or affidavit was positively problematic in the defence of the negligence claim.

We recognise that there may well be instances in which it is entirely necessary and appropriate for a lawyer to make statements, or even give affidavits, about a transaction in which they were previously involved. The important risk management warning is that, in these instances, the solicitor needs to be prepared to invest substantial amounts of time in reviewing events, correspondence, emails, electronic records, file notes, time records, diaries and, on occasions, discovery and subpoenaed documents, for the purposes of preparing a statement or affidavit.

Court proceedings which go to trial

Additional complications can arise when disputes go to trial.

Often the solicitor is not a party to the proceedings. Ordinarily, as a witness, the solicitor is not entitled to be represented at the trial. Frequently the lawyer takes this path without obtaining independent advice or the assistance of

legal advisers.

Although the solicitor might not be a party to the proceedings, there are nevertheless instances in which judges, in their published judgments, have been critical of their conduct in underlying transactions.

In recent years, there have been at least two instances (*Perpetual Trustee v Ishak* [2012] NSWSC 697; *Awad v Twin Creek Properties Pty Ltd* [2011] NSWSC 923) in which judges have made findings of negligence against a solicitor and have attributed a specified proportion of a plaintiff’s loss to the solicitor’s conduct – despite the fact that the solicitor was not a party to the proceedings and had not been provided with an opportunity to put submissions on the issue.

In NSW, the proportionate liability regime entirely allows for this outcome, and judgments or findings of the court in the fashion which we have outlined are completely conventional.

The risk management lessons

It would be wrong to assume that closed files cannot generate ongoing issues or problems.

When a lawyer is asked to give advice, or to do further work on a file which had been previously closed – it would be appropriate, in most instances, to stand back and independently consider the context in which further advice is being sought.

In some instances, this will be entirely ‘vanilla’. In other instances, issues of conflict, potential claim and factors concerning affidavits and evidence will need further consideration.

The claims solicitors at Lawcover are experienced in these areas. If a particular lawyer has concerns, they would be well advised to seek counsel from Lawcover’s solicitors about their specific circumstances. □