

# When an inactive file becomes a problem



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There are any number of reasons why a solicitor may end up with an inactive file – perhaps it remains open waiting for a response from a client or third party, or perhaps it has been put aside while other more urgent matters are being dealt with. In a busy practice, it is important to prioritise and it is understandably easy to ignore an inactive file while there are more pressing matters at hand. Inactive files can, however, be ticking time-bombs, and ignoring them can be perilous.

The recent case of *Council of the Law Society of New South Wales v Titmarsh* [2021] NSWCATOD 170 (*'Titmarsh'*) highlights how an inactive file can become a problem for a solicitor. In this case, the solicitor admitted a gross delay in effecting the transfer of land following the death of the registered proprietor. In fact, 14 years had elapsed from when instructions were received to obtain probate of the will and when the beneficiary, who was entitled to the land, died, without the transfer having been effected. To make matters worse, there was a further delay in the administration of the estate of the beneficiary, with 22 months passing without action by the solicitor in circumstances where the solicitor was the appointed executor.

In *Legal Services Commissioner v Dingwall* [2017] QCAT 76, a relatively junior solicitor failed to progress a number of debt recovery files over a period of about 11 months. She was carrying a heavy file load and the firm at which she worked lacked supervision and file review processes, which could have picked up the lack of action on the files.

In *Titmarsh*, the solicitor had a busy general practice, and noted his clients had been quite inactive during the periods where no progress was made. This begs the question: if a client is unresponsive or inactive, or the matter has lingered for a lengthy amount of time, what are you doing about the file?

A number of risk management steps can be taken to avoid problems associated with inactive files:

## Snapshot

- Ineffective file management can have significant consequences both professionally and financially for the solicitor and the client.
- Risk management steps can be taken to avoid problems associated with inactive files.

- **Have a file review process in place and use it.** Many practices have file review processes in place but are inconsistent in their approach. Often, file review tasks are 'bumped off' for more pressing matters. It may seem obvious, but a process doesn't work if you don't use it. Schedule time for file reviews and stick to it.
- **Identify your problem files.** It may not be obvious from the outset, but

there is a point in time when a matter becomes a problem file. Make this distinction at the time and flag the file in file review processes as requiring special attention. In the case of inactivity, be sure to check in on the file and client at regular intervals, and take detailed file notes and keep these on record. Identifying problem files is a critical step in mitigating against the risk associated with problem files.

- **Consider alternative strategies.** Sometimes a mental block can develop in relation to a problem file. It is useful to acknowledge the difficulty in progressing the matter, and consider options. If possible, tap into the experience of others to find a way forward. Consider referring the matter to someone else. If the problem arises from a client's failure to communicate instructions, one option may be to put the client on notice that you will be terminating the retainer, and then follow through by closing the file and getting yourself off risk.
- **Peer review.** If possible, develop a system of peer file reviews. Arrange with a colleague to swap 'problem files' on a regular basis. Not only will this provide an opportunity for file review that is mutually beneficial, but a colleague may offer up alternative courses of action you may not have considered.

Ineffective file management can have significant consequences both professionally and financially for the solicitor and the client. Having clear processes in place can help manage the risk associated with 'problem files' by drawing attention to inactive matters, critical dates, looming deadlines and disinterested clients. **LSJ**