

The limited retainer – carving out property taxes



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In *Australian Executor Trustees Ltd v Kerr* [2021] NSWCA 5, when considering whether a ‘penumbral duty’ exists, the Court of Appeal held, ‘[t]he better view is that what reasonable care requires in particular circumstances is fact dependant’ (at [258]). (see Langusch and Workman, ‘Penumbral duty no longer “an area of obscurity or uncertainty”’ 76 *LSJ* April 2021, 77.) This raises important considerations for solicitors when entering retainers with clients. In particular, solicitors acting on property conveyances may avoid disputes by clarifying the scope of their retainers with purchasers.

Case study: surcharge purchaser duty

Since the introduction of surcharge purchaser duty (‘SPD’) and surcharge land tax (‘SLT’) in 2016, solicitors have seen an increase in clients incurring unexpected tax liabilities by reason of their status as ‘foreign persons’ and seeking to recover those liabilities from their solicitors.

The duty of a solicitor to advise clients of their liability for SPD was considered by the NSW Civil and Administrative Tribunal in *Luo v Jemmeson & Fisher Solicitors & Accountants* [2017] NSWCATCD 33 (‘*Luo*’). The Tribunal held the solicitors did not breach their duty of care by not advising the purchaser that he was liable for SPD prior to settlement.

The Tribunal emphasised the ‘limited and specific’ nature of the retainer, which was simply ‘to act on the purchase [of the property]’. The Tribunal found that the solicitor was not retained to give advice on whether SPD applied to the purchase.

Furthermore, the Tribunal said the solicitor’s duty to give advice beyond the retainer was limited by the information provided to the solicitor by the purchaser. The solicitor was not made aware of facts indicating the purchaser’s status as a foreign person until the purchaser was bound to proceed to completion. As such, the solicitor did not breach their duty by not advising the purchaser of their liability for SPD until after completion.

Snapshot

- Recent authorities confirming that solicitors’ duties do not extend to giving advice beyond the retainer provide a useful reminder of the importance of clearly identifying the scope of a solicitor’s retainer.
- This reminder is particularly pertinent to solicitors acting on property transactions in the context of current issues arising with respect to duties or taxes levied on foreign purchasers.
- Solicitors should clearly state in their retainer whether or not advice on property duties and taxes will be provided.

Effectively limiting retainers for property conveyances

Luo suggests that simply having a limited and specific retainer ‘to act on the purchase [of the property]’ is sufficient to limit the duty of the solicitor to advise on SPD (and by extension, other property taxes) (at [80]).

The case remains to be tested by higher courts. In any event, it may be prudent to expressly limit the retainer for the sake of clarity between the parties and to avoid disputes down the track.

Some limitations to consider including in a retainer for a property conveyance are:

- the solicitor will not give any advice on the tax implications of the purchase, including whether the purchaser is liable for property taxes such as SPD, SLT, land tax, capital gains tax, or any other duties or taxes;
- any advice given is limited to issues affecting the conveyance of the property, and not any taxes, duties or other liabilities that may arise;
- the purchaser should seek independent advice from an accountant or financial adviser in respect of all taxes they may be liable for;
- the solicitor will not give any advice on any liabilities that may arise by reason of the purchaser’s residency status;
- any advice on taxes, duties or liabilities payable by the purchaser/s that is in fact provided is an estimate only, based on the information provided to the solicitor and purchasers should undertake their own investigations into the accuracy of such estimates.

If a solicitor becomes aware of facts during the execution of their retainer that put them on notice that the client’s interests are endangered then, depending on the circumstances, the solicitor may be required to warn the client of the risk and advise them further advice is required. **LSJ**