Episode 39 - Transcript

Advising on Litigation and Client Prospects

Intro

Litigation is constantly one of the highest areas of claims against lawyers, and the advice given about the prospects of success can be critical. Host Julian Morrow chats with barrister Amelia Avery-Williams about what is expected of solicitors when considering the prospects of success of a claim or a defence and how solicitors can protect themselves against allegations of negligence.

Julian: Welcome to Risk on Air. I'm Julian Morrow and today we're joined by barrister Amelia Avery-Williams and we're going to be discussing advising on prospects in litigation and, in particular, in what circumstances there's an obligation to advise your client that their case is hopeless and doomed to fail. Amelia, welcome.

Amelia: Thank you, thanks for having me.

Julian: The case we're talking about is *Victorian X-Ray Group v Malouf trading as Malouf Solicitors (No 3)**. It's very fresh. NSW Supreme Court, 23rd of July 2024.

And I couldn't help but notice that one of the barristers who acted in that matter successfully for the lawyers also had the surname Avery-Williams. Is there a relation or something?

Amelia: Yes, yes, that was me.

Julian: Fantastic. So I assume, given that you were successful, you believe that this case has correctly identified both the facts and the law.

Amelia: Yes, I do.

Julian: Excellent, excellent. So this is all about the importance for litigators of advising on prospects of success. Why is it important? I mean, it's a basic question, but why is it important for litigators to address prospects of success?

Amelia: Well, look, it's important for a number of reasons. Certainly, there is a provision in the Legal Profession Uniform Law for claims for damages that solicitors can't certify a claim or a defence unless they believe that, on a reasonably arguable view of the law and with provable facts, that the case has reasonable prospects. So a solicitor has an obligation to form a view about that.

And then the next step in the equation is well, if you formed a view that the case has no prospects or is hopeless, then you have an obligation to advise your client about that. And that's what this case was all about.

Julian: And it was really about whether or not you say well, you know you might not win this. We don't think it's a great case versus whether or not there are, in some circumstances, a positive obligation to say this is doomed to fail.

Amelia: Absolutely. And this was quite an interesting case because it was run as a case with that high bar that is hopeless and doomed to fail. It wasn't a case where the allegation was that the solicitors had failed to advise that the case was risky or even that there was a high risk or a significant risk that they would not succeed because, and they conceded this, they had been given that advice that their defences through the underlying litigation were risky. So the case they were running was that they should have been told right from the outset that their defence of proceedings was hopeless, utterly hopeless, and bound to fail.

Julian: And it's a fairly complex factual background, but could you give us, well, I suppose, what you think are the basics that we need to know to be able to understand this decision?

Amelia: Sure. So the solicitors for whom I acted, they had acted for the plaintiffs in a series of District Court cases. There were three cases against different entities in the Victorian X-ray group of companies, and each of those three companies was being sued by a company called Philips Electronics for an alleged debt. There was a service agreement for some equipment in a medical imaging business, and Philips was alleging that that service agreement had been breached. These three companies hadn't paid the amounts that were due, and so my clients, the solicitors, were acting for the Victorian X-ray Group companies in their defence of that litigation.

Julian: And you were successful. What were the particular facts about this case that meant that that high bar of having to advise that I think it was a defence in this case was doomed to fail? What was it that meant that this case was actually defensible, even if it obviously ultimately went down?

Amelia: There were a few things about it. So the first thing was that the solicitor who'd worked on the file kept some quite detailed notes about the instructions that the clients had given about the particular facts that would be used in the defence. And that was really helpful because in circumstances where the solicitors had all that information, that is, the facts that the client had said was true, here the particular fact was they were defending the Phillips proceedings on the basis that the service agreement had been varied by oral agreement. That is a conversation.

Julian: So it was a written contract and there was a question of whether or not you could vary that written contract just with words.

Amelia: Yes, and my clients, the solicitors, had taken some pretty detailed instructions about the conversation where that oral variation was said to have occurred and the file notes of those conversations were really helpful in showing the information that the solicitors had available to them when they were assessing whether or not assuming those facts could be proved - that is, assuming the witnesses were accepted about the oral conversation - then the case would have reasonable prospects of success.

Julian: So I don't think it'll be a shock to listeners to Risk on Air, a Lawcover podcast, to hear that making detailed file notes is very important, and it was particularly relevant in this case because there were some areas where perhaps the file notes weren't as thorough and that became a point of focus in the judge's consideration.

Amelia: Yes, absolutely, and actually something that became a point of focus in the case was the time entries that the lawyers had made in their billing software, because it didn't seem in any of those time entries that they'd recorded specifically time for reading the agreement that Phillips was suing in relation to. Now they'd recorded time for reading the Statement of Claim and reading the evidence, which had that document attached, but they hadn't specifically recorded time for reading the Service Agreement. So there was actually a live issue in the case about which lawyer working on the file had read the Service Agreement before giving advice that these defences could be filed.

Julian: Yeah, so the specifics of your note-taking and the way you record it in the billing system as well can be really, really valuable.

Amelia: Absolutely yeah, and I think that's not something that solicitors in a busy practice really think about. When they're recording time entries for billing software, they're really thinking about well, my client's going to be receiving this and they're just going to want to know the essential points about what I'm billing for. But it certainly should be borne in mind that it can be, and probably will be, used in litigation.

Julian: I suppose another thing to consider in this case is what sort of a law practice it was. How significant do you think the fact that it was a relatively small firm in this one?

Amelia: The firm was small, so it wasn't a big firm, but there were a couple of different solicitors who worked on the file.

Ultimately, I think there were three solicitors really who worked on the file, and the underlying litigation was not a large piece of litigation, it was a small matter in the District Court, although each of the proceedings was worth a couple of hundred thousand dollars.

But I think in this case, the fact that it was a small firm meant that when the judge came to consider what was practical and what was cost effective, that probably played in our favour, and in addition to that, you know, the team that was working on it were a small team with excellent notes and that seemed to ask a lot of questions and there were no gaps in the hierarchy that sometimes happen in cases where big firms have been sued, so I actually think it probably was helpful in this case.

One other thing that I think really helped in terms of the facts of this case is that, in addition to making detailed file notes, there was also a good amount of email correspondence where the solicitors had been taking instructions and asking for instructions when drafting their defence, and so it was helpful to be able to show that paper trail too and all of the questions that the solicitors had asked, making inquiries of the client about the kinds of things that form the basis for the defence.

Julian: What did the judge say about the sort of the type of matter and the impact that that has on how much detail a solicitor is supposed to go into?

Amelia: Yeah, so one thing that the judge did say is that the solicitor's task of forming a view about prospects needs to be essentially a practical one. So certainly the solicitor in this case was very experienced and had a kind of general practice, as I think you know, a lot of smaller firm solicitors do. And one thing that the judge did say is, well, he wasn't required to know the minute detail of, you know, every conceivable argument relating to the law and he also wasn't required to form a view about whether his client's evidence would be accepted over the other side's evidence about this oral conversation.

Julian: Yes, yeah, it doesn't have to undertake extensive analysis, even of the latest Court of Appeal cases or divergent English opinion, and noted that it was a relatively small case, and so I suppose it's valuable to bear in mind that you're exercising your judgment as a solicitor. It's got to be done in a practical and cost-effective way, but that doesn't change the fundamental realities about making sure that the record that you've got on the file is going to help in a circumstance like this.

Amelia: Yeah, I mean, making the inquiries in the first place was a really good place to start, that they were making a lot of inquiries of their client about the facts that could found this defence, and then the fact that they also recorded that in writing, that was an excellent bonus in terms of running this case.

Julian: What is the standard for 'hopeless and doomed to fail'?

Amelia: Yeah, that's a good question actually, because there's a provision in the legislation about what the solicitor is required to certify and what they're not required to do is, they're not required to form a view about whether their witness will be accepted or not, and they're not required to collect all of the evidence at the outset and examine it and determine is it admissible, will it be accepted? You know, things like that. All that they're required to do is to look at the facts and to say well, those facts are provable if we get evidence later on down the track. And also, in terms of the legal argument, on a reasonably arguable view of the law, we can argue this, and then that gets you over the threshold of utterly hopeless. That gets you into certifying that it's got reasonable prospects of success.

Julian: Amelia, I should ask you, as a barrister, what impact does getting the advice of counsel have on these sorts of questions?

Amelia: Well, it's interesting, Julian, because they had the advice of counsel in this case, in one of the three District Court proceedings. Counsel was involved in the default judgment application that I spoke about earlier and of course solicitors can take into account counsel's opinion. But the courts have been pretty clear that a solicitor is also required to form their own view. They can't just blindly follow what counsel says.

Julian: But it did help, didn't it on that particular question?

Amelia: Yes, it did.

Julian: Good news for barristers. Okay, so let's go from the specifics of this case to the more general question. Where should a solicitor start when making an assessment of the prospects of success in a particular piece of litigation?

Amelia: I think the best place to start is going to be asking the questions of your client to try and elicit what the facts are that you rely on in defending the case. So in this particular case, those facts involved the particular conversation, when that happened, who it was between, what was said. And then one of the proceedings didn't rely on this oral variation issue. In one of the proceedings the defence was, well, you're suing under a services agreement but we say the services were never provided. That's not something that needed to be investigated extensively before filing a defence because that would be the subject of expert evidence. But certainly if there are records, emails, diary entries of that kind of thing of somebody cancelling an appointment to come and service the machine or something like that, they're things you can request from your client upfront when they're telling you these facts that might support a defence.

Julian: And, as you said before, the back and forth can be really valuable there.

What about formalising the advice? How necessary is that?

Amelia: Yeah, that's another good question because I've certainly had cases where there have been allegations of negligence from not giving a written advice about prospects at an early stage too. You know, not kind of necessarily later on down the line when you get the evidence. That's another good time to give advice about prospects, obviously, but in terms of at the outset of a case, I think in part might depend on coming back to this issue about the size of the case and what's practical and cost effective.

But these days with email, recording things in email if you can do it, if you've got time in your practice, or even a file note of the oral advice you've given about prospects, particularly if you're advising you know there are reasonable prospects or there are not, definitely make a file note of that.

Julian: What else would you say solicitors should think about at those early stages to try and reduce the chances of being in a piece of litigation about whether or not they should have said that the litigation was doomed to fail.

Amelia: Yeah, in a Lawcover case.

Well, I was going to say that they could engage a barrister early on to give advice, but again, that depends on the size of the case, I think, because it's not always practical or cost effective to do that, but sometimes it is, particularly if it's an area that the solicitor hasn't got extensive experience in or maybe doesn't practice in often, then retaining counsel, even a junior counsel, to give an advice on prospects can help protect you from that kind of thing. But doing some research, not necessarily the latest Court of Appeal judgments, but if it's an area that you're not comfortable in or you don't practice in all the time, those kinds of things can help in forming a view about prospects of success.

Julian: There was one comment in the case that the litigation process has been used as sort of a bargaining chip in the commercial negotiations between the parties. Was that something that was delved into deeply in the case?

Amelia: It emerged from the instructions that the clients had given to the solicitors that I was acting for, because a lot of the email communication sort of said you know, we just want to get something on so that we can get them to a mediation, and I don't think that's uncommon. I mean, the judge made a comment in the judgment that certainly negotiations or commercial negotiations occur often in tandem with litigation. But that doesn't mean that you could file a defence that you knew had no prospects of success because you knew there was no basis for the facts or you knew that you know there was a High Court decision that essentially said your legal argument was completely wrong.

Julian: The judge also said that this is a question that needs to be considered prospectively. What's the significance of the test applying prospectively?

Amelia: Well, certainly it means you don't look back with the benefit of hindsight, you don't say, well, they didn't succeed in defending that District Court litigation. They did fail, so therefore they must have always been bound to fail, because that's the outcome. What the court focused on, and what I think we focused on in the case were the documents, the file notes, the emails, the instructions that were given to the solicitors in that very early period before the defence was filed. And then we didn't really focus on or even really talk about anything that happened much after that, because the whole case was about what did the solicitors know at the time those defences were filed?

Julian: You mentioned the certifying process as part of filing a pleading. To what extent is that determinative of this question of how much you have to advise on prospects?

Amelia: It's an interesting question, Julian. I mean, I don't do the certifying because I'm not a solicitor, but my observation is that solicitors just tend to sign that page without necessarily thinking about it too hard. And solicitors are officers of the court. They have duties not only to their clients but also to the court to ensure the proper administration of justice and to obey the law. So they really do need to think about, can these allegations be made out, assuming we get evidence to support them when they are certifying a defence or a statement of claim,

Julian: And if you do that rigorously and you genuinely direct yourself to that question, is that in itself going to be enough to protect you from a claim that you should have advised that litigation was going to be doomed to fail?

Amelia: No, and the answer is because it's not a subjective question. It's not about what you, as the solicitor, thought. It's an objective question. It's about what a prudent solicitor acting reasonably would have thought at the time.

Julian: We've dealt with the things that are involved in making an assessment of prospects of success. Moving down then to the question of filing particular pleadings, what can solicitors do when instructed, in either defence or commencement of proceedings, to protect themselves from this type of claim?

Amelia: Well, they can give advice, orally if there's a file note or in writing, about the prospects of success. They can have a paper trail which shows the inquiries they've made. You know emails, file notes, that kind of thing and the information that they've received. I think that in the modern day and age, because a lot of this happens on email now, it is much easier to maintain a paper trail about that kind of thing. You know, you write to your client, you ask them for documents about this or instructions about this conversation, and usually you get a response in writing. That's really helpful to me when I'm trying to find evidence to tender in the court.

Julian: And for the contract law specialists listening, how confident should lawyers be that you can orally vary a written contract if it's got a clause that says it needs to be varied in writing.

Amelia: Well, the law in Australia seems to be that you can vary a contract orally, even if it does have such a clause.

Julian: There you go. There were a couple of other issues that weren't just about the duty to advise and that went to both causation and damages. Is there anything you want to say about those issues?

Amelia: The damages that the plaintiffs claimed were the legal fees that they'd paid not only to their own solicitors who were my clients in the litigation but also to the other side, and one of the things that arose from the evidence that they put on about that is that a number of the legal fees weren't actually paid by the plaintiffs.

They were paid by other companies, and so one of the points that we took in defence, or issues that we raised, was well, how can the plaintiffs claim that as their loss when the amounts were actually paid by other companies?

And what ended up happening was, there was a separate day of hearing about damages and the plaintiffs served some further evidence and there's an interlocutory judgment about this. But they had created a whole lot of resolutions where the sole director of these companies had purported to resolve that there were loans between the entities after the hearing in this case and before the separate damages hearing. So there's an interlocutory judgment number two about the admissibility of those, and then the statements from the company, that is, the financial statements from the companies that had paid these amounts didn't show as an asset any loan that was owing from anybody else, didn't show a shareholder loan or a loan to directors in these amounts of the legal costs that they had paid, and so we were able to argue successfully that the plaintiffs, if they were entitled to damages, would not be entitled to these amounts that the other companies had paid.

Julian: One question I had, Amelia, I found myself thinking when I was reading this case was, is this a case where you spoke to your clients about whether or not the position they were taking in this litigation was doomed to fail or not?

Amelia: I wish I could tell you, Julian, but it's probably the subject of legal professional privilege.

Julian: A fair point indeed.

Amelia: I did tell them there were risks.

Julian: Amelia, thanks so much for speaking with us for Risk on Air.

Amelia: Pleasure. Thanks for having me.

Outro

Thanks for listening to Risk on Air by Lawcover. Join us for the next episode on current risks in legal practice to stay up to date.

Resources:

*Victorian X-Ray Group Pty Ltd v Malouf t/a Malouf Solicitors (No 3) [2024] NSWSC 888**

*NOTE: This decision is under appeal.