

Quick cautionary tales for a better practice

Episode 72

Retained or not retained?

The solicitor's retainer is the cornerstone of the solicitor/client relationship. It is important that both parties have a common understanding about the work a solicitor will and will not complete for the client. When a solicitor takes on work where there is an existing or former client on the other side, the potential for problems is heightened.

In *Toltz and City Garden Australia* the solicitor acted for a financier who was lending money to a borrower who was an existing client of the solicitor. The borrower was referred to another solicitor to advise on the loan transaction, but later alleged that the original solicitor owed the borrower a fiduciary duty and was in a position of conflict because of an ongoing, general retainer.

At first instance, the borrower was successful in that argument. However, on appeal, the Court found that the solicitor was not retained by the borrower for the loan transaction in question. Further, the court stated that the proper way to approach the question of whether a fiduciary duty is owed was not to consider whether the solicitor was retained by reason of the existence of an ongoing, general retainer, but to consider "whether the client can establish that the solicitor was retained on the particular transaction, a matter to which an ongoing, general retainer may be relevant".

Citing *Richtoll v WW Lawyers*, the Court of Appeal noted that a solicitor who seeks to limit their retainer ought to do so "clearly and usually in writing as a matter of prudent practice", although the existence of a retainer in each particular case will depend on the facts of that case.

Clearly setting out the scope of a retainer, preferably in writing, and being clear about limitations, benefits all parties. It helps provide clarity and reduce ambiguity between the client and the solicitor, leaving no room for questions down the track.

Careful consideration should also be given as to how you will manage a potential conflict, and issues clearly communicated, before acting on the other side of a transaction involving a former or current client.

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Gerrard Toltz v City Garden Australia Pty Ltd (in liq) (No 2) [2024] NSWCA 232

Richtoll Pty Ltd v WW Lawyers (in liq) Pty Ltd [2016] NSWSC 438

Minkin v Landsberg [2016] 1 WLR 1489