Episode 59

Pressure Points in Commercial Practice

Intro

This is Risk on Air by Lawcover. Today, it's a refresher on risks in commercial transactions.

Julian: Welcome to Risk on Air, I'm Julian Morrow. And today we're having a bit of a risk refresh, looking at the pitfalls involved in advising on commercial transactions. And I'm very pleased to say that we're joined by Malcolm Campbell, Principal and Director of Coleman Greig Lawyers. Welcome, Malcolm.

Malcolm: Thank you for having me.

Julian: It's great to have you and particularly because you're also the team leader of commercial services. So this is right down your alley. And really what we want to do is talk about a few instructive cases and some of the lessons that they've got for practitioners so that they don't end up being the subject of a podcast.

Malcolm: Yeah, yes, exactly.

Julian: Let's talk first about this case of *Commercial N and Huang* (*Commercial N Pty Limited v Huang & Ors* [2024] NSWSC 23), which was by Justice Henry in January of 2024. Could you talk us through that case?

Malcolm: Yeah, absolutely. And this case, I refer to as the curse of the busy practitioner. The case itself is not remarkable in any sense in terms of any new legal ground it breaks, but it's really instructive in terms of the pressures that practitioners have on a day-to-day basis in just getting their work done.

Sometimes the pressure of getting work done can outweigh practitioners looking after themselves and managing the risk appropriately on their files. This particular case was, from a legal perspective, a very plain vanilla loan advice situation. It has some peculiar facts to it, but they're more from a practice management point of view than actually any technical legal issues. There was a finding, unfortunately, for this particular practitioner that there was a failure to advise on one discrete issue, but by and large, the case is just a great example of how trying to look after your client, trying to get through your busy day and trying to make a dollar, to be honest, was their downfall. A lot of the time, lawyers think about risk management as, what do I need to do as an individual? Do I know enough about the law? Am I up to date with all the relevant cases? But when you look at this, you can see, oh, this was a whole firm issue in terms of the way they just handled the work.

Malcolm: And the failings really started off by the clients literally picking this firm from a list of three lawyers that the broker had said, oh, here's three lawyers you could potentially go and use. And they picked them because they were the cheapest. And that's the first lesson. If clients are making a choice about your services based on cost, I don't know if that's getting things off on the best footing. They nominated that lawyer; the lender then sent the documents without any prior warning to this law firm at 5:20pm on the 30th of September.

Julian: End of the day.

Malcolm: End of the day, like you would imagine nobody was looking at those documents. And then the claimants lobbed up at the lawyer's office the next day - unannounced. The receptionist handles it and says, oh, we can help you, yes, no worries. What's it all about? And there was a mother and a daughter, both Taiwanese. The mother didn't really speak much, it was mostly the daughter that was communicating. And for some reason, the receptionist said, come back at 8:30am tomorrow morning and we can deal with it.

When you go through the facts, the lawyer never normally took meetings that early in the day. And what had transpired was, there was already a meeting booked for 9:30am that morning. And so the receptionist has, I assume, thought, well, I'll put these people in early, an hour should do it, and away we go.

So, the clients turn up next day. Lawyer will not have had, or is very unlikely to have had the opportunity to review or look at the materials. It's earlier than they would normally be expecting a meeting. So we've got a situation where they haven't been able to prepare beforehand, client lobs up, they go into the meeting, they have the meeting and the lawyer deposed that he printed 2 copies of the documents the bank had sent that they had to advise on and went through the documents with the two people in the room (which was the mother and the daughter). He says in his evidence that he marked up notations to one copy of the document, gave advice, pointed out certain things to them. And then at the end of the meeting, the clean copy of the document was signed. All of the relevant compliance was done. He handed both sets of those documents to the clients and away they go.

Julian: And what were the records of the solicitor like about all these things you've just described for us?

Malcolm: Very good question. Because they hadn't had time to prepare before, there was no pre-making of a file note...

Julian: Here's what I'm planning to say to the client...

Malcolm: Or I should ask this question. Many lawyers who do this type of work may well have a checklist of pertinent points to make sure they cover off on. For example, myself, I'll review the documents beforehand. I'll mark up the document beforehand, pre-write a partial file note of things I want to ask and then complete that in the meeting. That didn't happen, obviously, because he was basically reviewing the document as he was advising on it, which is an incredibly difficult thing to do. I mean, these bank loan documents, they run into the hundreds of pages.

Julian: Yeah, so there's no practical way you can actually read it in a calm and considered way on the spot.

Malcolm: No.

Julian: Usually, if you're going to have a more concise conversation, it's because you've had the opportunity to go through things and work out what you think are the key points.

Malcolm: That's right, and let's add another layer to that. Based on the evidence, there appears that there was a language barrier involved as well. The evidence there was that the mother did not speak very much during the meeting, nodded, and most of the verbal communication was with the daughter. Of course, and I'll put this carefully...it was conveniently argued by the claimants in the case that the mother didn't have a very good understanding of English. Now, as a practical point, the receptionist and the lawyer probably should have paused at some point in time and asked the question, do we have a need for a translator here? There was no evidence that question was asked by anybody, and there was no file note to that effect either. And so, the meeting finishes, the two copies of documents handed, the marked up one and the signed one. Lawyer then rushes off to his next meeting at 9:30am. So, he has reviewed detailed documents and given advice and signed the certificate in an hour and then handed the documents back, gone on to his next meeting. Because of that time sequence, he wasn't able to make a file note until about 10:43am, I think the evidence was, that morning. So, it's still quite fresh in his mind.

Julian: But it's different from doing it during the meeting and you've just also had your head filled with another meeting.

Malcolm: Correct. The other risk or problem for him is he didn't have a copy of the markups. A brief file note is okay if you've said, see markups in attached document, because you'll typically write a note in the margin or you'll highlight something or put an exclamation mark, which would give some weight to your oral evidence of, yes, we really honed in on this point because I was really worried about it - you can see my exclamation mark in the contract. But because he didn't have that copy, no record.

Julian: So you've really got a collection of red flags around this. The urgent meeting, the first time, language barrier, documentation inadequate in terms of both what's been there in the brief, but then also how it's been recorded by the solicitor. And they're looking for a bar.

Malcolm: It gets better too.

Julian: But wait, there's more.

Malcolm: But wait, there is more. On top of that, it was a short-term loan, so it was a 26-week loan. It was refinancing a prior. The borrowers were a company that the daughter was the only director of, but it was being secured by a property in the mother and the daughter's name, plus it was paying off some other arrears of other loans and some water rates and other bills.

Julian: But wait, there's a lot more there.

Malcolm: That should, for most lawyers, raise a red flag of... Is this just a snowballing situation? And the case quite clearly says, and the prior cases on the area, particularly the Papa case (*Provident Capital Ltd v Papa* [2013] NSWCA 36), talks about, look, it's not the lawyer's job to make sure a transaction is a success or that...

Julian: That you don't have to advise on the wisdom of the wisdom.

Malcolm: That's right, you just have to advise of the obvious pitfalls and risks. And when you have that combination of facts, it probably would be sensible to say, hang on a minute, are we really comfortable that this is the best way forward? And the area of law that the lawyer was found to have missed out on was this higher interest rate. And what happened was when you defaulted under this short-term loan, as is the case with most of these short-term loans, there's this higher interest rate and there was a capitalisation of that interest. And so of course, the debt went through the roof. As soon as they defaulted, it just went through the roof and the claimants essentially said, we didn't know that. We weren't advised on, yes, okay, we understand if we default, that's a problem, but we didn't realise how big the problem was in terms of how quick the interest was going to accumulate. So, I can throw in some extra steak knives if you like.

Julian: Why not?

Malcolm: In the weeks following that advice, there needed to be a deed of variation done to the loan documents. And in a bit of a habit-forming pattern here, the clients again lobbed up unannounced to have that deed signed. So, no prior appointment made. And the lawyer, interestingly, again, I think that curse of the busy practitioner and wanting to please and wanting to get a result for the client, was in a meeting with another client, stepped out of that meeting, went into the reception, witnessed the signature of the deed of variation. He asserts in his evidence that the meeting went for about 10 minutes, the claimants assert it was literally sign here, done and goodbye. And he then went back into his meeting with the other client - no file note of that attendance. I'm not sure if I would have been overly happy if I was that other client that had their meeting interrupted.

Julian: But you do get this picture of a busy practice trying to juggle all the different client demands. And clients who, by the sounds of things, really are approaching this as a box-ticking exercise, but that can't be the way the solicitor does it. And it came back to bite them.

Malcolm: Yeah. And for the final bonus that I give you, there was a handmade variation to the documents made later on where, in the evidence one of the conveyancers, so not the lawyer in question here, one of the conveyancers in the practice, they say, took instructions over the phone from the client to make that handmade variation. The claimants assert no such instructions were given and unfortunately there was no file note of that meeting. So that just rounds out the whole situation, and I absolutely sympathise with the lawyer's predicament there.

Some of the practice management tips that really come out of that is educating all of your staff about the type of work you do. For example, in this case, if the receptionist had known, oh, this is an advice on loan documents, I've been told by the lawyer they need to look at them first. So, I can't book it in, right? The second element would be having the courage to ask politely and professionally questions about language. I know people don't want to make assumptions, but it is one of those few situations where it's a fair and reasonable and legitimate question of if I'm giving professional advice to someone, I need to know that they're going to comprehend it.

Julian: Especially when it's clustered with things like family relationships and commercial involvement in other aspects. I mean, it's very difficult on the diplomatic front, but it's really important.

Malcolm: Absolutely. And I don't really know, from having read the case, I wasn't in the room - I don't know these people personally. I do get the feeling from reading the judgment, though, that it was an argument of convenience by the claimants about the level of understanding of English. That can be dispensed with entirely if you ask those questions and make a note of it. But there wasn't any of that. I don't think the question was asked. So it's having the courage and the confidence to ask those questions. It's also from the lawyer's point of view, having the courage and the confidence to say to the clients, even if you're the one that has to get on the phone saying, I'm sorry, I can't meet you at this time, my receptionist was a bit eager to please there. I need to look at the documents firstly. Can we please reschedule? Because it eventuated that the loan wasn't settled for two weeks anyway. So it wasn't as urgent and rarely is it as urgent as the clients think.

Julian: And let's face it, despite the awkwardness of having those sorts of conversations, they're much better awkward conversations to be having than the ones that you end up down the line when all of a sudden people are looking to blame each other.

Malcolm: 100%. And then I guess finally, in terms of that practice management piece is a clear-cut case of the lawyer undervaluing their services. Have a guess, over 2 weeks' worth of work - we've got the initial meeting, we've got the deed of variation, we've got a subsequent handmade amendment. It's about a two-week turnaround time. Price is right. How much do you reckon they charge for the work?

Julian: You've got to be looking at a few $1000, don't you?

Malcolm: It was $1,000. At an hourly rate of $400 an hour, that's 2.5 hours work.

Julian: And I'm sure there's no lawyer out there who hasn't discounted a bill a bit, but there's no way that the amount of time spent on that is reflected in the bill, and I suppose that's an example of letting that client economy concern get in the way of managing your practice, let alone the matter.

Malcolm: And I think sometimes when the client is driven by price and then the lawyer doesn't address that issue, it almost reinforces it with the client. There really should have been that decision of - we need to review the documents first and I'm going to charge you for that because that's going to take an hour of my time. Then there will be the meeting. Straight away there is an hour of prep, an hour of meeting, that's $800.

Julian: And that's before your second random drop-in.

Malcolm: Correct. People who lob up unannounced don't value your time to not have that thought process of calling ahead and making an appointment. They really don't care about the practitioner or their diary or whatever like that. And so the practice management tip there is the rules of engagement with your clients. Set those boundaries early. Say, right, yep, happy to help, and this is the way we're going to do it. And teaching your reception staff and your admin staff to politely, professionally, also communicate that the process will be you send us the documents, we would look at them first, then we will have the meeting, and to do that, the cost will be X and we'll need you to pay that up front.

Julian: Some good reinforcements on the front lines.

Malcolm: Yeah, that's right. And it's not the receptionist's fault, because if they haven't been taught that, how would they know to do it? But if you can approach it from a team point of view, it would have given the lawyer that time and space to prepare properly, to ask all the right questions, to keep a record of it, and we probably wouldn't be sitting here talking about it now.

Julian: A year later, yeah. Well, let's talk about another case now. This is Hoeys Lawyers from back in 2021 (*ACN 115 918 959 Pty Ltd v Hoeys Lawyers Pty Ltd* [2021] VSC 79). What was this case about?

Malcolm: Yeah, this is certainly not your Mum and Dad style conveyance - it is a more sophisticated transaction. We had a development going on down at Marina Cove in Victoria, and Pearl Hill was engaged as the builder on this particular project. Unfortunately, as happens very frequently in building and construction work, the developer, Marina Cove, were experiencing some financial difficulty and owed the builder some money. So, there was a negotiation, as often happens, and in 2008 a heads of agreement was entered into to deal with the unpaid invoices and amounts that were owed to the builder. A deal was done where the builder could acquire these 33 waterfront lots for a heavily discounted price. They released each other in terms of any prior claims and then they were going to get on with the rest of the development. Unfortunately, further disputes arose and that's when this negligent advice allegation comes in. So we have Hoeys Lawyers and we have John Digby QC and then Kenneth Oliver, another barrister involved and they were acting for a Pearl Hill, the builder. There were these wranglings between the parties and it got to the point where the developer, Marina Cove, purported to terminate the heads of agreement. And so the builder sought some advice from their lawyers and barristers about what do we do? And unequivocally, the lawyer and the barrister, and really in this case, even though I mentioned Kenneth Oliver's name, he didn't really feature in the case and there was no finding of negligence against him. But Hoeys and Mr. Digby, they both advised Pearl Hill to terminate the contract, and they did, they followed that advice, terminated the contract and away we went. The problem with that was all they were left with was the right to sue the developer for money - problem being, developer didn't have any money. And that was why the whole thing came into play in the first place because they hadn't been paying their bills and there was some financial difficulties with the development. So from a legal point of view, what happened was by terminating a contract they lost the right to seek specific performance in relation to the acquisition of those 33 waterfront lots. All they could do was sue for the monetary damage or loss that they suffered. Well, lo and behold, developer goes into liquidation, the client's left with nothing. So they start turning around going, hang on a minute, we didn't realise that was going to be the consequence of terminating the contract. You should have advised us of that.

Julian: Were the clients enthusiastic to terminate?

Malcolm: Interesting question. The builder had always expressed to the lawyers the desire to acquire those 33 waterfront lots. So, they were frustrated, not in a legal sense, in an emotional sense of the disputes that were going on with the developer, but they had always articulated that they were very keen to obtain those lots. They got it as a substantial discount; it would have been a huge windfall for them. The only way you could do that was to sue for specific performance, because the company was not in liquidation at the time, it still owned those lots, your claim would have defeated a liquidator because it existed prior. It probably wasn't the smartest way to proceed to get that outcome.

Julian: So what it came down to was a debate about advising on the consequences of different options at this point of whether or not to terminate.

Malcolm: That's right. And the claimants say, the builder says, there was no such discussion - it was, should we terminate? Yes, you should terminate, there's a clear breach here. Terminate and off we go. They assert that there was no discussion about if we go down path A, this is what it looks like. But if we go down path B, this is the alternative way that it could go. The lawyer says that they did advise about that - the kicker, there was no file note. So, it was again that situation where they asserted that they had advised the client about the risks of termination.

Julian: But couldn't prove it.

Malcolm: But couldn't prove it.

Julian: What about the relationship between the solicitor and the barrister in this scenario?

Malcolm: I always come up with these sort of cute names with these sorts of cases and summaries - I refer to this case as the "Crisis of Confidence Case". And what I'm talking about there is the lawyer's crisis of confidence. And again, I've been there as a practitioner, and I'm sure many people listening can identify with this - I'm not 100% about my view, opinion or knowledge here. Oh, QC, they're smart, they know everything about the law, I'll just defer to them. And when you look at the case, basically the lawyer gets the advice from counsel and just forwards it in an e-mail to the client.

There is no qualifying statement, there's no, here's the barrister's advice, I'm not 100% sure if I agree with point ABC or let's have a discussion to talk about it because there's a few issues I want to agitate. It was just, here's the advice. So, the lawyer effectively just adopted counsel's advice. Many lawyers do the same thing - they get advice from counsel, they go, they know better than me, I'll just pass that on and adopt that as my advice.

Julian: But it just can't be an outsourcing access.

Malcolm: It cannot be, and there's a High Court case about it. As the lawyer, you must turn your mind to the case, and if you don't agree with it, to say so. They adopted the advice of counsel without any qualifying statement, there was no file note to say or to verify we spoke about the consequences, whether it was with counsel or not. There was just nothing there. The really interesting point here was, this is a large client for this law firm - they're a builder on a waterfront development, and the evidence that came out in the case was that there were lots of meetings between the lawyer and the client about much more insignificant legal issues that were going on. So there was this habit of the parties meeting and talking. But for some strange reason, when it came to a very serious issue, like the termination of the contract, no meetings were held, let alone even suggested. So there wasn't that, here's counsel's advice, let's sit down and go through it together. It was just, there's the advice to terminate. Again, I think it was that whole crisis of confidence from the lawyer's point of view of counsel knows better, I can just rely on what they are saying. And ultimately, that was found against the lawyer as negligent, that they were found to be negligent in not exploring the other options and the consequences of each option.

Julian: And was that found against both the solicitor and the barrister?

Malcolm: Yes. So, both were held liable in that respect. It was argued by the lawyers that, well, it wouldn't have mattered what we said, they were going to terminate anyway. Let's say in this instance, they had said, if you terminate, you've only got a claim for damages, if you don't terminate but seek specific performance, we could still get the lots, and you knew that the client wanted the lots, but they had instructed you to terminate nonetheless, you would be very, very well advised to make a note of that and to say, that's contrary to my advice. Like the instructive part of it is if a client chooses speed or convenience or cost as the motivator, you just need to pause and make sure that you have reduced to writing what your advice is on that point. Because there was very much this situation where the builder had just had enough, now they just wanted it resolved, and terminating did resolve it, just not very well. And again, you do have that tension with clients of, I just want this problem sorted, you know, what am I paying you for sort of thing, get on and deal with it. But that can sometimes be contrary to what they've actually already articulated to you they want to achieve. It's like, yes, okay, I can do that, but it's not ultimately going to help your best interests to be.

Julian: And the court ultimately didn't accept that argument that they were just going to terminate it.

Malcolm: No, absolutely not. two or three interesting final points from a risk management point of view is that the court acknowledged that it is reasonable for lawyers to take into account the level of sophistication of their client.

And so it is important for lawyers to be conscious of the level of experience and prior involvement that clients have had in these matters and to make a note of it. The reason is because the builder in this case asserted that they didn't understand a lot of the terminology that was being used, like specific performance or termination or these sorts of things. Now, the lawyers were saying, hang on a minute, this is a builder that's been involved in many developments, has signed varieties of different contracts and been given lots and lots of advice over these things. So the lesson is, when you're just having your general chit chat with your client, make a note of their level of sophistication and the prior involvement they've had with these sorts of things, because it can then guard against the client conveniently later on saying, I have no idea I was relying solely on what my lawyer told me. If they've got other advisors involved - accountants, financial planners, architects, town, whatever, note it.

Julian: That as well, yeah.

Malcolm: In a complex, large, significant matter things will go wrong, doesn't always mean it's negligent. And so it's very helpful from a record keeping point of view to know who else is involved, just to guard against that very convenient argument of, I was relying solely on you.

Julian: Yeah, and worth bearing in mind as well, I suppose, that many of the terms that lawyers just day by day are using and are familiar with, just for the ordinary punter, even if they are involved in business, they don't have the resonance that lawyers understand them to have, and it always bears repeating and writing down that you've repeated it.

Malcolm: Absolutely. And having FAQs or very helpful information sheets about common legal terms or whatever. I have, in my day-to-day practice right now, I have many very successful business people who don't have degrees, didn't even finish school, right? English might not even be their first or preferred language.

Malcolm: So, they might not understand specific terminology, but they are incredibly astute at what they do in business - they're the sorts of clients you've got to be really careful of that you're speaking the same language effectively as them.

And lawyers need to get good at, and I'm not going to say dumbing it down because that's not what it is, it's just using the right language in the right situation. Get to know your client, make sure you're engaging with them at that right level.

Julian: Well, let's move on to another complicated building scenario to deal with this issue of conflicts and situations where there can be long-standing relationships between a firm and clients. And while that is in some ways, the mainstays of practice, it can also be a source of significant risk. Talk us through the case of Gerrard Toltz v City Gardens, No 2 (*Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd (in liq) (No 2)* [2024] NSWCA 232).

Malcolm: Yeah, if you read about the case at the time, you would probably be quite aware of it because the decision in the first instance was, I probably think it's fair to say, shocking in many respects to a lot of lawyers because of the finding that the lawyer in question actually was acting for both borrower and lender. We landed on the right decision ultimately, but gee whiz, it cost a lot of people a lot of time, a lot of money and a lot of stress to get to the right answer. And there were certainly a number of things that when looking on reflection, of course, hindsight's a lovely thing - simple things could have been done to avoid this. And when I read this case, I was like, oh my goodness, you know, this could happen to anyone. And my sort of summary of this case is it's the commercial lawyer's utopia spoiled. I spend my day trying to establish solid, long-running, constant relationships with my commercial clients - I want to be the go-to guy. If they have a question, I want them picking up the phone to me, I want their work, I want to have that position where I'm just continuously doing work for them. And this lawyer had done that with both of these clients so the situation in very brief was he had acted for both of the lender and the borrower over a long period of time, just almost like on a general retainer basis. So, the lender did have a practice of providing private funding, particularly in the building space, and Mr Toltz had done all of that lending work for them continuously from about 2016, I think it was. So, any lending work, he did it. Great gig, fantastic - that's what you want as a lawyer, that repeat work. They had also done some work for the borrower, City Garden, and a number of the related entities of one of the directors, Mr Day. And we have this situation where, unfortunately for Mr Toltz at the time, the lender, Gemi, was lending some money to City Garden. So, 2 clients of the same firm - it's a complicated factual scenario, but basically there was three separate loans, the loan in question was the first one, the second and third one snowballed on them badly and it ended up being a debt City Garden owed of about $21 million. In the first instance, Mr Toltz was found liable to the tune of 75% of that, even though the first loan was only, I think, for $2 million or about $2 million. So, a liability of $16 million over a $2 million loan scenario - I can imagine how upset everyone would have been and just shocked at that outcome. And one of the findings was that, and one of the practical takeaways is you've got to be very careful about that snowball effect. You do have to be conscious of downstream effects. You can't guard against everything, it's not your job as the lawyer to prevent all of those things, but you do need to advise on the obvious risks that may become sort of downstream problems.

Julian: Yeah, so because it sounds like a scenario where there's kind of two rolling general type retainers. What did the Court of Appeal say about this idea of a general retainer?

Malcolm: Yeah, and this really hit home for me because I have a lot of clients on general retainer. And what they said, they criticised the decision at first instance and said, because at first instance, the finding was the general retainer included advising on the loan documents for the borrower. There was evidence in the case from Mr Toltz that he had express conversations with Mr Day, one of the directors of the borrower of, if it comes to lending stuff with Gemi, I'm acting for them, I cannot and will not act for you. And interestingly, there was a certificate of independent legal advice signed by the borrower, witnessed by another lawyer. Now, when I read the case, I thought it was another lawyer in Mr Toltz's office. But no, it was another lawyer from another firm.

Julian: That seemed to have a pretty cursory involvement.

Malcolm: Yes, but... Let's just recap on that. We have Mr Toltz who prepared (there was no dispute), he prepared the loan documents for Gemi. He was acting for them, there was no argument about whether he was acting for them. But then we have this client, City Garden, who he also had a general retainer for. He had verbally, and this is the problem, it wasn't in writing, verbally told Mr Day, I can't act for you in these matters. But to support that, there is a certificate of advice from another law firm. At first instance, they still found that general retainer sort of captured that work. Mr Toltz should have known and he should have told the other director because one of the directors didn't sign that certificate of advice - it was signed by a director and a secretary. And the initial decision was, well, had Mr Toltz as a part of that general retainer and he should have as a part of that retainer involved the other director, none of this would have happened. But the Court of Appeal basically said that, no, conflicts arise with an analysis of the retainer for specific work being done, not the fact that there is just...

Julian: ...a broader ongoing relationship.

Malcolm: Yes, and a history of having acted. And the evidence ultimately on appeal, it was found that Mr Toltz was not acting for the borrower in that instance. So, it was very much I think an unfortunate situation for Mr Toltz because he was otherwise doing a very good job of building up a nice clientele of clients that had ongoing significant legal work and it was interesting in the case, there was reference to whether or not Mr Toltz had become a bit too close to...

Julian: ...yeah, references to social events and things like that. Yeah.

Malcolm: When I was reading the case, it was almost alluding to the line had become blurred between professional and personal, and what had then happened was that a professional lens hadn't been sort of put over the facts of saying to Mr Day, who was the director that the friendship was with, look, you need to go elsewhere, I can't keep acting for you in this situation, which I found interesting because I just don't accept that as a general proposition. If I have two really good commercial clients and it was this exact factual situation, I would be saying to the borrower, love working for you, we can keep working for you on everything else, but on this matter, go and see Billy Bloggs, he'll do the independent advice and then I can't deal with you on the transaction itself because I'm going to act for the lender, but by all means, everything else...

Julian: ...Why wouldn't you? You can still manage that relationship with clear communication, but you do have to set some boundaries in terms of the work that you're doing, more so you're saying than the social boundaries. It's about just being really clear when the circumstances are bringing you into a possible conflict scenario.

Malcolm: And that's probably where Toltz, no doubt, has reflected on this. If I just had a more specific retainer or an e-mail or a letter or something that confirmed what he'd said verbally, if I cannot act for you in this particular matter or our retainer excludes this sort of situation, it would have significantly helped. So, the practical element for Mr Toltz here and for all lawyers is your system needs to make sure that you can, as best as possible, prevent conflicts rather than trying to cure them, because the curing them might not always be the end of the story. That's really the practical issue here. And look, it's just one of those risks of practice. You just have to be so on guard with what you're doing all of the time. I recall a prior mentor of mine saying, the business of law is really interesting. On one hand, you're sort of fighting the other side with a sword, but in the other hand, you've got a shield kind of defending yourself with the client in terms of the risk management elements - you're that sort of person in the middle, it's really, really difficult. And you can see in all of these cases that we've spoken about, the lawyers just wanted to get on with doing their job and getting an outcome for the client. The first scenario we spoke about with Commercial N, it was just too busy, too much, not given that breathing space and maybe not having the confidence to slow it all down a bit. In terms of the Pearl Hill Building case, it was probably over-reliance on counsel, that whole, I'm not as smart as them, I'll just rely on that. Now again, whether there was an element of busyness and just didn't have time to think it through carefully, or just that lack of confidence to actually challenge, and that is a hard thing. As a practitioner, it is hard to have a conversation with counsel to say, are you sure about that? I don't know if I agree with that. And you've got to protect the dynamics of the relationship because you don't want to erode your client's confidence in counsel. Because then they'll be saying, well, why the hell did we brief him? You know, that sort of thing. And then in the final scenario, it's like, well, I've done a great job building up my business and my clientele.

Julian: Now that's the problem.

Malcolm: Now that's the problem. And it's like, oh my goodness. So, it is very much that situation of from a risk management point of view, you've got all the technical legal issues that you need to be very conscious of, and I think that a lot of lawyers, when they think of professional negligence, think of I'm going to get the law wrong. But when you look at the facts and you look at the stats, the data is there that shows really the cause of most professional negligence claims or notifications actually emanate from the business side of practice. It's the poor communication or the lack of training or confidence to prevent the lawyer being put in that situation in the first place. Yes, we do make errors of law, and I think the latest stats show that it's about, I think it's about 20% of cases relate to not knowing the law. But 80% of them are about other reasons, and if you talk about, well, let's deal with the low hanging fruit, let's deal with the easiest things first to manage our risk - well, I would have thought it's in that 80%.

Julian: And setting up your procedures so that they're reinforcing the professional role that you have to play, developing practices that insist on them, which all goes to that overarching point, which is in the end, you are going to be held responsible for your independent professional judgment. And you're going to not only want to exercise that always but record the way you have.

Malcolm: And that, again, that is the challenge in being a busy, successful lawyer is the documentation of it. It doesn't matter how you do it, there's no right or wrong way to do it. There are probably good and better ways of doing it, I don't care if it's on the back of a beer coaster, if that's all you got in front of you at the time to make a file note, make the file note. But it's just about doing it and do it, setting it up for you and your team, and that includes all client facing, because people often think about professional negligence just being about the lawyers.

Julian: It's about the office.

Malcolm: It's about the office, as we heard with the receptionist before and all of those... Setting up your team, so creating those records is as easy as possible. Because if things are difficult, they don't get done. So, you're setting up systems, processes, educating your staff as to why it's important - if you ask an employee, to do something else in their day-to-day work, if they don't understand the importance of it, they don't see the reason for it, a lot of the time they just won't do it.

But if you can provide that education of this is why this is so important, we need to be doing this on a repeat basis, file notes, asking questions about language barriers, those sorts of things, you're minimising your risk profile because those alarm bells that we could readily pick out retrospectively in these cases, would have come up at the time. It doesn't mean that problems aren't going to happen. It doesn't mean mistakes aren't going to be made, but it will just highlight them at the relevant time, and it will give you a fallback position of, we asked that question, the answer was X, and here's our note of that.

Julian: Well Malcolm the way you've talked us through the complexities of these commercial transactions and some procedures that will protect practitioners in their approach, that makes me think that I would, if I was walking down the street, just lob up to your office, try and get some advice. I hope I wouldn't get a meeting too quickly if I did.

Malcolm: Yes, yeah, absolutely.

Julian: Thanks very much for joining us on Risk on Air.

Malcolm: Thank you. Been a pleasure.

Outro

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

Resources:

Commercial N Pty Limited v Huang & Ors [2024] NSWSC 23

Provident Capital Ltd v Papa [2013] NSWCA 36

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

ACN 115 918 959 Pty Ltd v Hoeys Lawyers Pty Ltd [2021] VSC 79