

What's In, What's Out: Drawing the Line on Property Tax Advice

Risk management topics:

Practice Management

Property and Lending



Mili Vukancic
Claims Team Leader

Recent cases offer helpful reminders that a solicitor's duty is defined by the scope of their retainer.

This matters more than ever in property transactions, particularly with ongoing issues with surcharge purchaser duty (SPD), surcharge land tax (SLT) and other taxes that can catch clients by surprise.

Why this matters in practice

It's not uncommon for purchasers to assume their solicitor will warn them about *all* risks – especially tax. But the courts have been clear: **a solicitor is not required to advise on matters outside the agreed scope of work.**

The key question isn't "*What could you have said?*"
It's "*What were you engaged to advise on?*"

Unclear terms of engagement create real grounds for dispute.

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A familiar scenario: unexpected tax bills

Since SPD and SLT were introduced, some clients, particularly those deemed “foreign persons” under relevant legislation, have faced unexpected tax liabilities.

When that happens, the first question is often “*Why didn’t my solicitor tell me?*”

That’s exactly what was tested in *Luo v Jemmeson & Fisher Solicitors & Accountants* [2017] NSWCATCD 33 (*Luo v Jemmeson*).

What the Tribunal said

In *Luo v Jemmeson*, the solicitor was retained “to act on the purchase of the property.” The purchaser later argued the solicitor should have warned them about their liability for SPD before settlement.

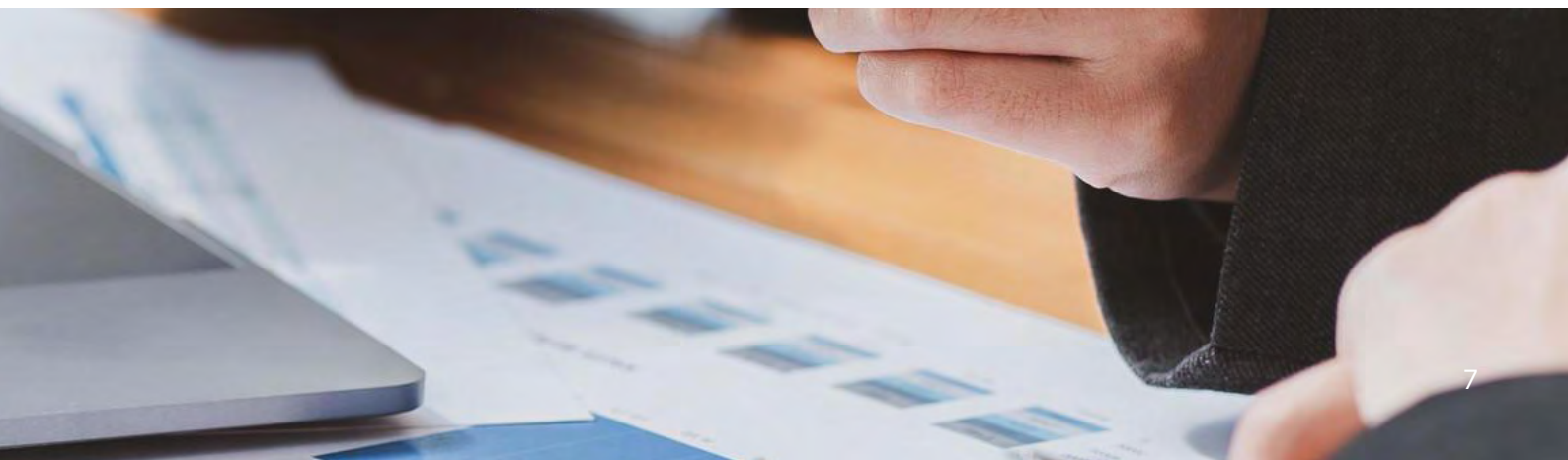
The Tribunal disagreed.

Two practical points came out of the decision:

- **A limited retainer limits the duty.**
The solicitor was not engaged to advise on SPD.
- **The duty depends on what the solicitor knows about the client’s circumstances.**

The solicitor did not have enough information early on to identify the client as a foreign purchaser. By the time the identification documents were provided to the solicitors, and the solicitors advised of the requirement to pay SPD, the transaction was effectively committed.

No breach of duty was found.



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Getting your retainer right

Luo v Jemmeson shows that a well defined retainer is one of your strongest risk management tools. For property transactions, **it's worth being very clear about what is and isn't included.**

Consider stating that:



You are **not providing advice on tax consequences**, including SPD, SLT, land tax or CGT



Your role is **limited to the conveyance of the property**, not broader financial or tax issues



The client should **seek independent advice** from an accountant or financial adviser



Any comments you do make about **tax are an estimate only**, based on the information provided and purchasers should undertake their own investigations into the accuracy of such estimates.

A note of caution

A limited retainer, however, isn't a complete shield.

If, during the transaction, information comes to your attention that suggests a real risk to the client, such as information indicating they may be a foreign purchaser for tax purposes, you may still need to:

- Flag the issue; and
- Suggest they obtain specialist advice.

This is less about giving tax advice, and more about avoiding potential harm.

Most claims in this space don't arise because solicitors *forgot* to give advice. They arise because the scope of the retainer was never clearly defined.

It doesn't need to be complicated. It just needs to be clear.

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Risk management guidance

To reduce risk:

- Explicitly **set out the scope** of your work;
- Clearly **exclude tax advice** where **appropriate**;
- Direct clients to **independent advisers**; and
- Stay **alert to obvious risks** that may require a warning.

A simple, well explained retainer can prevent a complex and costly dispute later on.

