

Do you really know who your clients are?

The New South Wales Court of Appeal allowed the appellant's appeal against the decision of the Supreme Court of New South Wales that there was a solicitor/client relationship between the appellant and the respondent solicitors despite the fact that the respondents were never formally retained by the appellant.

The issue

- Whether, in the absence of a retainer and a costs agreement, a solicitor/client relationship can be implied by conduct.
- Whether a co-client has ostensible authority to provide instructions to a solicitor.

The background

The appellant married Borce Trajovski (the husband) in 1992, and they separated in 2006. During their marriage, the appellant and the husband received legal representation from the respondents (Ian Simpson and his law firm, Simpson & Partners Solicitors Pty Ltd) in connection with the purchase of businesses and land by corporate entities controlled by the appellant and the husband.

After their separation, matrimonial property proceedings were brought in the Family Court. The respondents continued to act for the husband in those proceedings and the appellant retained her own solicitor. The proceedings concluded by way of consent order that required the husband to pay the appellant \$800,000. In order to meet that order, the husband, with the consent of the appellant, listed the couple's matrimonial property for sale.

The appellant instructed her own solicitor to act in the Family Court proceedings but chose to act for herself (partly due to threats the husband made towards her) in relation to the sale of the matrimonial property and the increase to loan facilities arranged by the husband on behalf of companies they controlled.

Prior to the settlement of the sale of the property, the husband threatened the appellant that she had to sign all documents to allow the sale to proceed and to instruct her solicitor not to lodge a caveat against the title of the property or else he would kill their children and then kill himself. As a result, the appellant withdrew her instructions from her own solicitor. Her solicitor informed the respondents of the husband's threats and that the respondents would therefore have to take instructions from the appellant directly. The solicitor also informed the respondents that he was aware that the husband was not intending to pay the appellant the full balance due to her from the sale of the property.

On instructions solely from the husband, the respondents released the sale proceeds to third parties and did not account to the appellant for her share of the sale proceeds. Rather than paying the appellant in accordance with the Family Court orders, the husband used the sale proceeds and the loan facilities to fund his business activities.

The issues at trial

The appellant claimed damages against the respondents for breach of professional duty, complaining that in acting on the sale of the property, they breached duties owed to her by enabling the net proceeds of sale on completion to be disbursed without her authority. The trial judge dismissed her claim on the basis that the respondents were not retained by her and therefore owed her no duty of care, and that if they did, they were entitled to act on the instructions of the husband alone, who had the appellant's ostensible authority.

The issues on appeal

The main issues on appeal were whether the trial judge erred in finding that there was an absence of a solicitor/client relationship between the appellant and the respondents and whether the husband had the appellant's ostensible authority to provide instructions to the respondents regarding the disbursement of the sale proceeds.

The decision on appeal

The respondents' usual practice in relation to documenting the retainer was less than ideal. Not only was there no evidence of a written retainer, there was also no evidence that there was any costs disclosure to their clients (whether it be the husband and/or the appellant). Accordingly, the Court of Appeal had to consider whether the evidence supported the existence of a retainer with the appellant. The Court of Appeal found that contemporaneous documents (including a letter to the real estate agents stating that they acted on behalf of all the registered proprietors, including the appellant) and oral evidence given by the respondents established that they were retained to act on behalf of all the registered proprietors of the property.

In relation to the scope of their duty to the appellant, the Court of Appeal noted that a retainer is with each and every client and a solicitor owes duties to each client. Therefore, where a solicitor is acting on behalf of several clients, the duties owed to each client are distinct and not necessarily co-extensive.

The respondents alleged that the husband had the appellant's ostensible authority and they were entitled to act on his instructions alone. The Court of Appeal disagreed. There was no evidence that the respondents received authority from the appellant to act on the husband's instructions.

The Court of Appeal found that the respondents' duty to the appellant included exercising reasonable care and skill to complete the sale of her interest in the property in accordance with the terms of the contract, but subject to her instructions, and that the duty extended to seeking instructions from her as to how her share of the net sale proceeds was to be disbursed. The Court of Appeal held that it was a clear breach of duty by the respondents in disbursing the appellant's share of the net sale proceeds to third parties without her express instructions, especially in circumstances where the respondents were on prior notice of the threats the husband had made and that the husband had no intention to pay the appellant's share of the sale proceeds.

The Court of Appeal made no finding of contributory negligence on the basis that the appellant had no need to lodge a caveat because had the respondents discharged their duty, she would have received her entitlement in full.

The respondents endeavoured to reduce their liability by alleging that the husband was a concurrent wrongdoer. The Court of Appeal held that the husband was not a concurrent wrongdoer because the appellant's interest in the property was that of a joint registered proprietor rather than a security interest.

Implications for you

The case is a timely reminder of the importance of having a written retainer in place identifying all the clients a solicitor is acting for. It highlights the fact that situations may arise where the interests of co-clients are not identical and that solicitors need to be alert to situations of conflict. When actual conflict arises, the solicitor should cease to act for both parties.

[Trajkovski v Simpson \[2019\] NSWCA 52](#)

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