

SOLICITOR LIABLE FOR CLIENT'S LOSS OF OPPORTUNITY TO RECOVER A DEBT

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A solicitor was liable for his client's failure to recover a debt from a third party due to the third party's bankruptcy.

In Issue

Whether the client appellant, who had successfully obtained a judgment against a third party, had lost a valuable opportunity by reason of not obtaining that judgment earlier, and the calculation of the value of that lost opportunity.

The Background

The appellant retained the respondent solicitor to recover an amount owed to it by Bouzanis. The respondent commenced proceedings against Bouzanis within time, however, the respondent failed to pursue the proceedings over the subsequent three years. The respondent accepted that was a breach of his duty to the appellant.

In January 2010 the appellant instructed new solicitors who subsequently commenced fresh proceedings against Bouzanis in June 2010. Judgment was obtained in the fresh proceedings in August 2012 in the sum of \$200,808. An appeal by Bouzanis was dismissed on 20 April 2013. Bouzanis was served with a bankruptcy notice in June 2013 and entered bankruptcy on 18 December 2013. No dividend was recovered from the bankruptcy.

The appellant then commenced proceedings against the respondent, seeking damages for his failure to expeditiously pursue the initial proceedings.

The Decision at Trial

Despite the respondent admitting a breach of duty, the trial judge found for the respondent on the basis that the appellant had failed to prove loss on the balance of probabilities.

The Issues on Appeal

The key issues on appeal were whether the appellant was entitled to recover for loss of a valuable opportunity, even if it could not be established on the balance of probabilities that the opportunity would produce financial gain; whether the trial judge erred in holding that, on the balance of probabilities, the appellant had not established financial loss; and the assessment of the value of the lost opportunity.

The Decision on Appeal

A majority of the Court (Basten JA and Barrett AJA) found on behalf of the appellant, with Macfarlan JA dissenting. As to the first question, the majority found the opportunity to have the initial proceedings pursued expeditiously had real value to the appellant, even when a number of uncertainties remained about whether the appellant could have enforced the judgment due to Bouzanis's financial position.

As to the second and third questions, Basten JA and Barrett AJA found that the trial judge had erred and

the calculation of loss was to be undertaken by an assessment of possibilities in accordance with established principles for loss of commercial opportunity. It was held in that regard that an appropriate assessment ought to allow the appellant to recover 50% of the debt, without interest, in the sum of \$100,000.

Implications for you

This decision illustrates the importance for solicitors and others in service-based industries to progress matters on behalf of clients with diligence, so that clients do not lose valuable opportunities through delay. Even in circumstances where the benefit of a lost opportunity was not certain, as long as it was not theoretical or of negligible value a party may still recover for that lost opportunity.

Mal Owen Consulting Pty Ltd v Ashcroft [2018] NSWCA 135

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