ACTING IN LITIGATION

Skipping litigation basics can land a practitioner in hot water.

Over the past few years, the LPLC has seen a rise in claims resulting from practitioners acting in commercial litigation. In 2019-2020, commercial litigation was the second highest area of law for claims at 18 per cent, with property and conveyancing at 27 per cent.

The examination of three claim scenarios is useful to illustrate that getting the basics wrong in commercial litigation can lead to big ramifications for both client and practitioner.

Jurisdiction limit error

A barrister acted for a client in Magistrates' Court proceedings obtained for the client judgment in default of a defence. The default judgment was for $123,000, but the jurisdictional limit of the Magistrates' Court is $100,000, making the default judgment defective. The barrister erroneously believed that the jurisdictional limit was $200,000.

The error was compounded when the instructing solicitor advised the client to issue a creditor's statutory demand against the defendant to recover $123,000. The solicitor gave this advice even though the barrister had informed the solicitor, after realising their error, that the default judgment was probably defective because of the jurisdictional limit.

The defendant successfully applied for a rehearing and the default judgment was set aside. The winding up proceeding therefore failed. The client was ordered to pay the defendant's costs and looked to the barrister and solicitor to reclaim the costs.

Cooked books

The practitioner acted for the vendor of a small business to defend proceedings issued by the purchaser. The purchaser alleged that the vendor had falsely represented the business's profits through discussions and in a statement made pursuant to s52 of the *Estate Agents Act 1980* (Vic). The vendor vigorously denied the allegations.

The trial judge did not accept any of the evidence given by the vendor at trial. The trial judge accepted the purchaser's expert accounting evidence about discrepancies in the business's financial figures. The vendor's expert accountant had admitted in evidence they were not appropriately qualified to give expert evidence. The trial judge concluded that the vendor had "cooked the books" and entered judgment against the vendor. The purchaser was also successful in obtaining costs on an indemnity basis because the judgment exceeded settlement offers made by the purchaser during the litigation.

The vendor alleged the practitioner had acted negligently because the practitioner had not advised the vendor about the risks its defence would be unsuccessful, in particular that:

- there was a risk the trial judge would not accept the vendor's denials of oral representations alleged to have been made
- the trial judge may prefer the purchaser's expert evidence over that of the vendor's expert evidence
- the vendor may be ordered to pay the purchaser's costs on an indemnity basis if the vendor did not accept the purchaser's offers of compromise, and the vendor did not beat the offers at trial.

A hollow victory

A practitioner acted for a purchaser of a business in proceedings against the vendor. The purchaser and vendor were from the same church community. The vendor enticed the purchaser to buy the business by promising that the vendor would repay the purchase price if the purchaser later changed their mind. After two days in the business, the purchaser changed their mind but the vendor refused to return the money.

The purchaser wanted to seek justice against the vendor and was unwilling to accept any offers to settle the proceeding less than of the full amount paid for the business. The practitioner advised the purchaser to accept offers made by the vendor because even if the purchaser was successful, it might be a hollow victory because the vendor did not appear to have any assets.

The purchaser was successful at trial but was unsuccessful in recovering the money. The purchaser said that the practitioner should have advised them not to proceed with the claim because there was little prospect of recovering the money from the vendor and costs had been incurred in pursuing a fruitless recovery.

Although the practitioner had apparently provided this advice on numerous occasions, none of the advice was given in writing and the file notes recording the oral advice given were scant.

TIPS

- Check relevant legislation to ensure that a court or tribunal is the correct forum and has sufficient jurisdiction for the client's claim.
- Keep records of your advice and confirm any important oral advice in writing.
- Give your client a written merits advice which clearly identifies any weaknesses and areas of exposure. Update this advice as new information and documents come to light.
- Critically assess all settlement offers and advise your client about the merits of the offer and the consequences flowing from accepting or not accepting it.

Lessons

These are just some examples of when and where litigation can go wrong due to simple errors and failure to manage the legal issues, and the client looks to the practitioner to recover their loss. By ensuring the basics were covered some of these claims could have been avoided.

LPLC has a handy litigation checklist and a revised commercial litigation practice risk guide on its website to help prompt practitioners about matters to consider when acting for clients in litigation. ■

Thanh Bui is special counsel at MinterEllison. This column is provided by the **Legal Practitioners' Liability Committee**. For further information ph 9672 3800 or visit www.lplc.com.au.

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