



# The perils of pre-contract advice

**CLAIMS ARE OFTEN MADE AGAINST SOLICITORS FOR INADEQUATE PRE-PURCHASE ADVICE. SOME COMMON CAUSES OF THESE CLAIMS AND THE DECISION OF THE SUPREME COURT OF THE ACT IN *McLENNAN* ARE CONSIDERED.**

**BY STEPHEN BUBB**

Solicitors are often asked to provide pre-purchase advice to a client buying residential property. The instructions often come just before an auction or when the client is due to meet the agent to sign a contract, leaving the solicitor with long documents to review and a short time to properly advise the client. Given these circumstances, it's not surprising that pre-contractual advice features commonly in conveyancing claims against solicitors.

If you accept the instructions, regardless of the time involved or fee, you owe the client a duty of care. If you don't discharge your duty to the client and they suffer loss, they may bring a professional negligence claim against you.

Solicitors need to be cautious in these

situations. Don't accept instructions to act unless you have the time, knowledge and experience required to do the work properly. It must be within your direct area of expertise. A quick contract review or failure to give full advice may not discharge your duty of care if something goes wrong.

## Your duty of care

A recent decision of the Supreme Court of the ACT in *McLennan v Clapham and others*<sup>1</sup> (*McLennan*) is a timely reminder to solicitors about their duty of care.

In that matter in 2009, the clients were proposing to buy a residential property to live in and engaged a firm to act. They provided a copy of the unsigned contract to the firm and then met the firm's conveyancing clerk to go through the contract. Before this purchase, the house had been insulated with loose-fill asbestos and had purportedly undergone a removal process. There were documents attached to the contract in relation to asbestos including an asbestos advice fact sheet and a certificate of completion of asbestos removal work.

In 2014, after receiving a letter from the ACT Government, the clients had the property tested. It was at this point, years after purchase, that the clients learnt about the dangers of loose-fill

asbestos. The clients took part in the government buy-back scheme and pursued litigation against the firm which provided pre-contract advice, alleging they were not adequately advised about the risks and consequences associated with buying this property. They said that with proper advice they would not have proceeded to purchase.

The pre-purchase advice was given by an experienced conveyancing clerk in the solicitor's office, but there was no file note to record the details or what advice was given. The clerk could not recall acting for the clients in 2009, and her evidence was based on her "usual practice" when advising on an asbestos affected property.

The clients' evidence was that the only discussion about asbestos was when the clerk pointed to an asbestos advice fact sheet attached to the contract and asked them to read it, before pointing to the asbestos removal certificate which they skim read.

In the judgment the Court made these points about a solicitor's duty to exercise reasonable care and skill:

"A solicitor owes a general duty to explain legal documents to the client, or at least to ensure that the client understands the material parts. In particular, a solicitor should explain any unusual provisions or any provisions of particular relevance to

the clients' proposed activities, or which might influence the client in deciding to enter the contract.<sup>2</sup>

"In the case of property transactions, a solicitor should explain both the relevant risks attending the purchase of property and the consequences of that risk to the client."<sup>3</sup>

"A solicitor acting for the buyer of property is paid not only for what the solicitor, in fact, does, but also for the responsibility he or she assumes in trying to protect clients from financial loss if things go wrong."<sup>4</sup>

"A solicitor has a duty to warn a client of a material risk inherent in the proposed purchase."<sup>5</sup>

The Court accepted the clients' evidence that they were only given a chance to skim read the contract documents and no advice was given about the asbestos<sup>6</sup> and said:

"That does not amount to the provision of competent legal advice. The plaintiffs could have sat in their own lounge room and read the contract for sale document for themselves. Reading a document and appreciating its consequences are two different things. What they were paying the defendants for was a professional legal opinion on the risks and consequences arising from the contents of that particular contract for sale. The asbestos information in the contract required someone to properly explain to the plaintiffs exactly what the risks and consequences were, so as to allow them to make an informed decision about whether to make further enquiries and ultimately whether to purchase the property. That finding is consistent with the evidence of both expert witnesses."<sup>7</sup>

## Claims experience

Our claims experience shows a broad range of allegations about inadequate pre-contractual advice. Some of the recurrent issues we see in claims are set out below.

- Failure to identify or fully advise the client about restrictions recorded on the land title such as restrictive covenants, easements and s173 agreements. Clients need to be made aware of these restrictions, including the material effect and consequences.
- Not advising the client about the terms of a lease, particularly about options for further terms and rental reviews or other unusual clauses such as provision for rent-free periods.
- Inadequate advice about planning permits, zoning and planning scheme regulations that affect the clients' use or intended use of the property. Planning matters can be complex, so refer the client for specialist advice when required.
- Not identifying and advising about title boundaries, common property, car park or storage titles, particularly on complex plans with air space or height restrictions. The client should always be given a title plan and directed to do a physical inspection or engage a surveyor to do it before purchase. A proper physical check can identify missing titles, areas of adverse possession, structures over title boundaries and incorrect boundary fencing.
- Not clarifying the services connected or directing the client to do a physical check. Specific advice should be given about properties that are not connected to the electricity network, sewerage or water supply and clients directed to get specialist

advice about operation requirements, future connection, capital and operational costs.

- Not explaining land transfer duties and taxes such as GST and CGT that may result from the transaction, particularly in family or trust transfers. Refer the client for specialist advice if required.
- Failure to identify and explain ongoing charges such as GAIC, land tax, owners corporation levies or a flammable cladding special charge.
- Not explaining the concept of *caveat emptor* and that in general a purchaser takes the property in its condition at purchase, including issues of illegal structures, termites, flammable cladding, asbestos and safety. A report from an authorised building inspector or other specialist is an important part of the clients' due diligence but you must identify and make them aware of the issues.
- Not explaining the risk and consequences of default, and that preliminary finance approval is usually subject to valuation and other requirements from the lender. Consider a subject to finance condition.

## What you should do

To give pre-contract advice under time pressure you should use a checklist and a good precedent letter that covers all the issues. You need the time to establish the client's intentions, properly review the documents and provide advice.

If you don't have the time to do these things, then to manage your risk of a claim you should either decline to act or clearly limit your retainer, making sure the client understands the risks of the limited retainer. This must all be confirmed in writing.

A record of instructions received and advice given is critical in all legal work and is even more important for pre-contract advice on property transactions in a declining property market.

## Summary

*McLennan* is a good reminder to solicitors about their duty of care when giving pre-purchase contractual advice to clients. There are a multitude of things to cover and you need the time, knowledge and systems to do this work safely. Sometimes it's better just to say no.

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1. [2019] ACTSC 1.
2. Note 1 above at [50].
3. Note 1 above [51].
4. Note 1 above [52].
5. As above.
6. Note 1 above at [72].
7. Note 1 above at [73].

### SNAPSHOT

- A failure to give adequate pre-purchase advice to property purchasing clients is a common cause of claims against solicitors.
- *McLennans* case is a reminder to practitioners about their duty of care and what they must do to discharge that duty.
- Solicitors need the time, knowledge and experience to do this work safely and sometimes it's better to decline to act.