

A significant part of what we do is to provide world-class risk management services and information, to assist practitioners in managing risk and minimising their exposure to claims. We have developed some short videos to help you with claims prevention.

Who are you acting for and who do you think you are acting for?

Keeping in mind throughout any matter the question “who is the client” is an important risk management strategy. We see practitioners getting into trouble when they lose sight of who their client is, particularly when unrepresented parties are involved. It doesn’t take much for a lay person to think a lawyer is acting for them or looking after their interests. An unrepresented party (and sometimes even another represented party) might assume you are acting for them when you provide advice, documents or discuss issues with them.

This commonly occurs in:

- joint venture situations where there are several parties involved all in heated agreement, but with very different interests or
- in sales of businesses where only one party is represented or
- when acting for a company where the directors have different interests, meaning they need separate advice from the company.

A good example is that of a practitioner who should have realised he was acting not only for a property developer who came to him with a deal but also the developer’s company and the individual joint venturers who later joined with the developer. Even though the firm was only formally retained by the property developer (we’ll call him Joe) and his company, there were actually a number of joint venturers who invested in the project. The firm’s retainer was to act in the purchase of a property and to draw a joint venture agreement. The company was appointed manager of the joint venture.

Joe introduced the joint venturers to the project, telling them the practitioner was a specialist in property law and any queries about the agreement should be addressed to him. Several joint venturers then spoke with the practitioner directly. Some were existing clients of the firm.

Shortly before settlement there were insufficient funds to complete the purchase. The company, in breach of the JVA, used the property as security for bridging finance. The property was registered in the company’s name and mortgaged to the finance company – without the knowledge or consent of all the joint venturers.

When the joint venturers discovered this, they instructed the practitioner to lodge caveats to protect their interests and then consulted independent solicitors. Six months later the joint venturers took control of the property and it was sold for two thirds of its purchase price.

The joint venturers made a claim against the firm and practitioner alleging a breach of retainer. The firm denied any retainer with the joint venturers. The practitioner claimed he acted only for the property manager, Joe, and his company.

However, the firm’s file was however peppered with references to acting for some or all of the joint venturers from time to time as well as the joint venture vehicle. There was a fee estimate for acting for the joint venture, an email from Joe to the joint venturers and the firm saying the firm was acting for the joint venture, and some of the joint venturers had listed the firm as their solicitor on the expression of interest form.

It is clear the practitioner had acted for the joint venture and so owed the individual joint venturers a duty of care regardless of whether or not he was retained to act directly for some of them.

To avoid situations like this you need to be very clear who you are acting for. Keep asking yourself throughout the matter

- who is the client?
- who are the other parties involved?
- are they unrepresented so they require independent advice?
- should they be represented by somebody else?
- and am I giving an unrepresented party the impression that I am looking after their interests?

Where there are other parties involved in the matter who are unrepresented you may need to clearly tell them and confirm in writing that you’re not acting for them. Suggest they obtain their own independent legal advice as you can’t assist them.