

## ***Watson v Ebsworth & Ebsworth* [2008] VSC 510**

Lawyers acting for solicitors in professional negligence and like claims will be reaching for *Watson v Ebsworth & Ebsworth* [2008] VSC 510 for many years to come. The decision of Justice Beach was given on 27 November 2008 after a 3½ week trial.

Everyone agreed that the defendant solicitors acted for a racing car driver and an associated company (I will refer to 'the driver's camp'). What an alleged \$24 million hung upon was the question of whether the solicitors also acted for others who were associated with the driver under an implied retainer until there was a falling out, or, despite not having a contractual relationship, whether the solicitors nevertheless owed duties of care in tort to the non-clients, or owed fiduciary duties. Once there was a falling out, the camp which came off worse, the other associates (whom I will refer to as 'the former associates'), sued the solicitors for negligence and for acting in the face of a conflict of duties owed to them and the driver's camp and for preferring the driver's camp's interests over their interests.

This is a common enough question in professional negligence claims, especially where the solicitor acts for one party to a transaction in which the other is unrepresented, has communications with each, and does not make sufficiently clear to the unrepresented person that the solicitor does not act for them. But its resolution rarely receives the kind of detailed analysis given by Justice Beach, whose decision re-emphasises the importance in resolving disputes about who owed whom what duties of precisely ascertaining the facts, and then working out from first principles the inter-relationship of alleged contractual, tortious and equitable interests.

What may follow where the solicitor acts for the husband and confers with the husband and wife without making clear that he does not act for the wife did not necessarily follow, in other words, when the represented and unrepresented parties were sophisticated business people who had entered into similar transactions before, had ready access to their own lawyers whom they in fact used from time to time, and who chose to seek advice from the driver's camp's solicitors from time to time:

'in respect of matters which involved the [driver's camp] and in which they also had interests, which may or may not have diverged from the interests of the [driver's camp] from time to time', 'probably in the knowledge that they were not likely to receive an account for which they would be personally responsible' (see [115]).

The associates pointed to occasions when the solicitors gave advice about agreements to which they were or would be a party, and to matters personal to one of them, in support of the proposition that the solicitors were acting for them: at [112].

His Honour found that the solicitors had in fact given 'advice concerning legal matters' to the former associates. But they did so on the instructions of their clients, the driver's camp, in order to advance the clients' interests. There was no informal contractual relationship with the former associates.

And the equitable and tortious duties had to conform to the contractual relationship, the ascertainment of which assumed a pre-eminence in the reasoning process. Even though in respect of limited and discrete matters in which the solicitors did give advice to the former associates, they owed duties of care and fiduciary duties, it did

not follow that every fiduciary duty known to man pervaded the entire relationship between them and the solicitors (see [122], which was broader than the discrete transactions which gave rise to them. Carefully ascertained, the 'matters' on which the solicitors did advise the former associates were different from the matters in which the solicitors were said to have done the wrong thing. How the solicitors described and organised their files was relevant but not determinative in this regard. His Honour said:

'(with respect to specific transactions) the defendants owed duties of care and fiduciary duties to [one or more] of the [former associates]. For example, in performing discrete work for [one of the former associates] in advising about the terms of a particular agreement with a third party, the solicitors owed [it] a duty to take reasonable care in relation to the provision of that advice. However, the claim here is that the [solicitors] owed [fiduciary] duties of loyalty and good faith to the exclusion of [their clients] and duties to avoid conflicts of interests, being conflicts between the interests of the [former associates] and the interests of the [solicitors'] actual clients. [They] owed duties of care and fiduciary duties to [the driver's camp]. No duty that conflicts with these duties can, in the circumstances of this case, be owed by the [solicitors] to the [former associates].'

**Stephen Warne**