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Case Study: The responsibilities within a retainer

The issue:

Just how far-reaching and binding are the provisions of a retainer? Far reaching indeed, as two LAWPRO insured recently hit with large judgments for professional negligence discovered. In both cases, the solicitors assumed that their clients had taken over responsibility for specific tasks needed to complete a transaction; in both cases, the solicitors failed to properly confirm this transfer of responsibility in writing. The result: transactions that failed and lawsuits in which the clients denied assuming any responsibility. In both cases, the judges accepted the client's position that the lawyer had failed to complete the responsibilities within his retainer.

Case A: Loan agreement

The law firm in this case was representing a bank which was lending money to a lumber mill. According to the terms of the loan agreement, the lumber mill was required to have in place business interruption insurance before the loan could be advanced.

Because the solicitor acting for the bank did not feel qualified to evaluate the size of the required insurance, he wrote to the bank stating that he understood that the mill was consulting with an insurance broker to determine the appropriate level of coverage; his letter also stated that he understood the bank would be consulting an insurance agent about the adequacy of the coverage obtained by the lumber mill.

In fact, the bank did not consult with an insurance agent, nor did it respond to the solicitor's letter. Neither the bank nor the solicitor followed up to determine if any insurance reviews were conducted.

The result: the loan transaction closed and the bank's solicitor advanced the funds without any evidence that the mill had obtained the required business interruption insurance. The lawyer did not draw his deficiency to the bank's attention. When the mill subsequently burned down, the bank successfully sued for its \$450,000 loss.

ABN Amro Bank Canada v. Gowling, Strathy & Henderson (1995) 20 O.R. (3D) 7179 (Ont. Ct. Gen. Div.)

The judge's decision

The judge accepted the bank's position that it was the solicitor's responsibility to advise the bank that the mill had not produced evidence of business interruption insurance, and to seek instructions from the bank accordingly. The judge indicated that the lawyer's letter did not absolve him of this responsibility; it merely indicated that further consultations about the sufficiency of the insurance coverage were needed.

Case B: Leasehold interest purchase

In this case, solicitors were retained to complete the purchase of a leasehold interest in a major office complex. The client was particularly interested in exercising all options to renew and extend the lease, as it planned to sublet the premises in question at a higher rate, thus generating a steady stream of income for itself. The solicitors understood that these renewals were crucial to the client, and confirmed in writing that they were instructed to exercise all options to renew immediately after closing of the leasehold agreement.

Although the purchase closed in December 1986, the client did not pay out the full purchase price until November 1987, at which point it was in a position to exercise the first renewal option. But the solicitors did not exercise this option to renew, nor did they advise the client to do it themselves.

The result: Because the option to renew was not exercised in a timely fashion, the lease was terminated and the client sued the solicitors for damages. In their defense, the solicitors claimed that the instructions to renew the lease were "spent" by November 1987, because it had been impossible to exercise the renewal option immediately after closing in December 1986. They could not see themselves taking responsibility for exercising an option several years into the future. The client sued successfully for more than \$9 million.

The judge's decision

According to the judge in this case, solicitors who accept instructions do something but later decide that they will not follow through on these instructions, must advise the client of their decision; they must also ensure that the client knows and understands the solicitor's position, so that the client can get legal advice if he wishes. The client was not responsible for determining if the solicitors' duty had been done, and was clearly entitled to rely on the solicitors to renew the lease, in the absence of any advice to the contrary.

120 Adelaide Leaseholds Inc v. Thomson Rogers (1995) 43 R.P.R.(2d) 78 (Ont. Ct. Gen. Div.)

LAWPRO's advice

Put it in writing. If you plan to relieve yourself of some portion of your original retainer, clearly confirm this with your client,

preferably in writing. Make sure that the client knows and understands the responsibility he is undertaking, so that he can seek legal advice elsewhere. Two judgments have made it clear: Once a matter falls within a solicitor's original retainer, any subsequent confusion about who is responsible for what will be decided against the solicitor.

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