



The Implied Retainer – take care not to offend your PI Policy

The Implied Retainer

The duty to a lawyer's clients is second only to a duty to the Court.¹ A crucial and seminal part of that duty is to explain adequately, and preferably record, the scope of the lawyer's retainer. The recent case of *Polon v Dorian*² reemphasised that where solicitors omit to establish a formal retainer, but act in a manner which conveys a lawyer-client relationship, a retainer may be implied. An implied retainer can fix the lawyer with broader duties than a lawyer might have otherwise accepted.³ There are two key knock-on issues which are the subject of this article:

- the breadth of an implied retainer might extend to non-legal services; and
- this in turn may lead to coverage issues for lawyers under their professional indemnity insurance policies.

Always document a Retainer

It is prudent practice to record a retainer in writing with as much particularity as possible. Problems arise when a lawyer acts in a way that causes more than one party to rely on that lawyer's advice or services, whether the lawyer intends this or not. Even though the lawyer may consider only one of those parties to be the client, courts may conclude that the other party or parties were a client by implication.

The issue is more likely to arise if the lawyer does not make it abundantly clear to those other parties that:

- he or she does not act for them; and
- they should seek independent legal advice.

For the purposes of professional indemnity insurance, it is prudent to err on the side of caution and document all such interactions, to ensure that the lawyer's relationship with all parties is made clear as early as possible.

Spot the Implied Retainer

The implied retainer is not a new concept, particularly in front-end transactions such as conveyances, mergers, due diligence and general advisory work.⁴ In practice, the implied retainer tends to arise where solicitors acting on express retainer for one party hold themselves out to another party to also act (in some way) for that other party. In particular, the issue arises when the lawyer has not identified a need to document a formal retainer with all parties who appear to be relying on the lawyer.

¹ See *New South Wales Professional Conduct and Practice Rules 2013*, rr 3.1, 4.1

² [2014] NSWSC 571

³ See, for examples on scope, *Carey v Freehills* [2013] FCA 954; *Heydon v NRMA Ltd* (2000) 51 NSWLR 1. This article does not deal with scope of duties.

⁴ See *IGA Distribution Pty Ltd v King and Taylor Pty Ltd* [2002] VSC 440 (implied retainer where solicitor on commercial transaction assisted both parties); *Pegrum v Fatharly* (1996) 14 WAR 92 (implied retainer with lender where the borrower's solicitor agreed to prepare documents for both lender and borrower).

A non-exhaustive 'salient features' guide to spotting an implied retainer was proposed by Allsop P in *Caltex Refineries (Qld) Pty Ltd v Stavar*.⁵ To paraphrase the list, some red flags which may indicate an implied retainer are:

- is the (implicit) client relying on me;
- am I assuming a responsibility to this client;
- am I proximate to the client (eg. do I take instructions in some way);
- does a special relationship exist (eg. am I the only lawyer on the transaction);
- how important is the legal issue I am assisting with;
- what are the consequences of me acting;
- is any harm avoidable by me or the client;
- do I understand or appreciate the consequences of acting; and
- do I have conflicting duties?

The paraphrased list is also not exhaustive, but recent cases suggest that the overarching question, difficult as it may be, is: am I acting as a lawyer for both parties? If the answer is yes, subject to conflict, both retainers should be documented with the greatest particularity possible lest an implied retainer arise.

Consequences of the Implied Retainer

The implied retainer does not ordinarily impose a higher standard of care per se. It does, however, prevent the lawyer from defining the scope of his or her retainer in a way he or she usually would. Subject to regulations, minimum standards, and the *contra proferentum* doctrine, a solicitor can and often does stipulate express terms in a retainer to:

- circumscribe his or her role (eg. acting for a purchaser on a transaction only, or acting as an adviser on the benefits of settlement only);
- quarantine him or herself from unwanted exposures;
- dictate the particular tasks to be conducted, when and how; and
- set a fee or fee type for the work.

Say a solicitor presents him or herself as a 'full-service' solicitor but in fact only has the requisite expertise for civil litigation: an implied retainer will hold that solicitor to the 'full-service' standard.

This can lead to a solicitor falling short of an implied contractual, and sometimes equitable, duty of care. Worse still, not only can it lead to a lawyer unknowingly agreeing to extend the scope of retainer into a field outside his or her expertise, it can morph into the category of non-legal services which are not covered by insurance. In the latter circumstance, liability to an implicit client may be sheeted home to the solicitor without recourse to insurance.

Insurance risks

Lawyers derive comfort from the knowledge that legal professional acts or omissions are ordinarily covered under professional indemnity insurance. The ultimate issue, which is at times forgotten, is that an implied retainer threatens that comfort.

Lawyers will be aware that their professional indemnity policy excludes,⁶ among other things:

- auditing of financial reports under Chapter 2M of the *Corporations Act* 2001 (Cth);
- providing a financial service under Chapter 7 of the *Corporations Act*;
- a contract other than a contract to provide legal services;⁷ and

⁵ For the full list, *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 639 at [103].

⁶ The authors caution that this article does not purport to provide legal advice and is only the opinion of those authors.

⁷ As defined within the lawyer's professional indemnity insurance policy. There are some carve-outs to the exclusion.

- a contract which extends the lawyer's duty beyond exercising the care and skill to be reasonably expected of the lawyer in the circumstances.

While a written retainer might not protect a lawyer who plainly provides a financial service (such as influencing a person to buy or sell an investment product),⁸ it aids the interpretation of the retainer.

The key message, based on recent cases and industry concerns, is that solicitors be mindful of the services they provide, and to whom they provide them. Vigilance goes a long way towards ensuring that implied retainers are properly identified, understood, and avoided where necessary. Observing a few key checks and balances in practice may increase a lawyer's chance to maintain protection under his or her professional indemnity insurance in the unfortunate event of an action for breach of an implied retainer.

June 2014

This article was prepared by James Stanton and Simon Lusk.

For further assistance with professional responsibility matters, please contact Simon Lusk, Director (t: 9231 7017, e: slusk@ypol.com.au) or James Stanton (t: 9231 7027, e: jstanton@ypol.com.au)

On 1 September 2007, three of the leading insurance and commercial litigators of Phillips Fox joined forces with the established and respected insurance and commercial litigation specialist, Yeldham Lloyd Associates to create our firm.

On 5 May 2008 we enhanced our capability and commitment to the insurance and reinsurance industry with the addition of a specialist corporate and regulatory team.

We are a specialist incorporated legal practice. We are focused on insurance, reinsurance and commercial litigation.

Our directors are recognised locally and internationally as among the best in their fields. They are supported by an experienced and talented team.

We are accessible, straightforward and responsive. We are about providing the best legal service at a reasonable cost.

For more information on our firm please visit www.ypol.com.au

DISCLAIMER

This paper was prepared by YPOL (James Stanton).

This update is intended to provide a general summary only and does not purport to be comprehensive. It is not, and is not intended to be, legal advice.

LEVEL 2, 39 MARTIN PLACE
SYDNEY NSW 2000

DX 162 SYDNEY

T: +61 2 9231 7000
F: +61 2 9231 7005
WWW.YPOL.COM.AU

YPOL PTY LTD TRADING AS
YELDHAM PRICE O'BRIEN LUSK
ACN 109 710 698

LIABILITY LIMITED BY A SCHEME
APPROVED UNDER PROFESSIONAL
STANDARDS LEGISLATION. LEGAL
PRACTITIONERS EMPLOYED BY YPOL PTY
LIMITED ARE MEMBERS OF THE SCHEME

© YPOL Pty Limited

⁸ The meaning of financial service can be broad: see *Corporations Act 2001* (Cth), s 766A.