

Penumbral duty no longer ‘an area of obscurity or uncertainty’



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The legal principle of a solicitor’s so-called penumbral duty has been considered in New South Wales in a series of cases in recent years. Fittingly, one of the dictionary definitions of ‘penumbra’ is ‘an area of obscurity or uncertainty’. In February 2021, the NSW Court of Appeal directly addressed that uncertainty in the matter of *Australian Executor Trustees (SA) Limited v Kerr* [2021] NSWCA 5 (*AET*).

Penumbral duty refers to the contention that in certain circumstances, a solicitor has a duty of care, outside the ambit of the solicitor’s retainer, to take some further action for the protection of the client’s interests beyond the function specified in the retainer. In *AET*, Gleeson JA (with whom Leeming JA and Emmett AJA agreed) held that no such duty existed.

Cases in which penumbral duty has been argued have tended to fall into two categories: those involving vulnerable clients and those involving sophisticated clients. *AET* was an example of the latter. An experienced commercial trustee retained solicitors to provide legal sign-off on a proposed transaction, on a limited basis and subject to numerous assumptions and qualifications. It was alleged the solicitors breached their penumbral duty to provide advice (beyond their limited retainer) and warn the trustee of a risk which could arise if a party to the transaction became insolvent, notwithstanding that one of the assumptions which the solicitors were instructed to make was that the entities involved would remain solvent.

Citing *Jadwan Pty Limited v Rae & Partners (A Firm)* [2020] FCAFC 62, Gleeson JA noted that what reasonable care requires in particular circumstances is fact-dependent. His Honour agreed with the proposition that ‘what is sometimes described as a penumbral duty is no more than a particular aspect of a solicitor’s primary duty’ (*AS Bannister v Sirrom Enterprises Pty Limited* [2016] SASCFC 153).

Gleeson JA held the trial judge was correct to reject the existence of a penumbral duty. The solicitors were not retained to negotiate the terms of the transaction and the trustee did not seek advice about that topic. The trustee was a professional corporate trustee which demonstrated its sophistication

Snapshot

- The NSW Court of Appeal has recently confirmed that solicitors do not owe a ‘penumbral duty’ to give advice beyond the retainer.
- As the retainer is paramount, clearly define the work to be undertaken at the outset of a matter and, if appropriate, review the retainer during the course of the matter.

by seeking specific advice in a particular format, limited to certain aspects of the proposal. There was no duty to give advice beyond the retainer.

Solicitor’s retainer is paramount

The decision reinforces the paramountcy of a solicitor’s retainer, as emphasised by the High Court in *Astley v Austrust Limited* [1999] HCA 6, and the need for discipline around scope of retainer. Conceptually, penumbral duty represents a departure from that analysis and, probably for that reason, had attracted limited

judicial support to date. The notion of an additional shadowy duty existing outside the defined scope of the retainer would mean the discharge of a solicitor’s duty could not be confined by the retainer, unpicking the discipline of determining the scope of the retainer and undermining the importance of that exercise.

It is nevertheless important to recognise the possibility that where a particular question is posed, a prudent hypothetical solicitor might, depending on the circumstances, suggest that additional advice should be sought by the client. The source of such obligation is not a penumbral duty but the solicitor’s retainer, the scope of which informs the solicitor’s duty. The scope of the retainer should be considered not only at the time of formation of the retainer but also when it is performed.

The *AET* decision is important because solicitors are frequently asked by sophisticated clients (such as corporate trustees) to provide highly specific advice based on limited instructions. The imposition of a penumbral duty would have the undesirable effect that solicitors may feel reluctant or unable to accept limited instructions, and to increase the cost of the exercise to those clients.

Penumbral duty has also come under recent consideration in Western Australia (*AVWest Aircraft Pty Limited v Clayton Utz (No 2)* [2019] WASC 306) in a transactional context with a sophisticated client and a limited retainer. In that case, Vaughan J followed appellate authority to the effect that the solicitor’s retainer will determine the duty. **LSJ**

Note: YPOL Lawyers acted for the solicitors in the *AET* case.