SUPREME COURT OF QUEENSLAND

CITATION:	*Stringer v Flehr & Walker & Anor* [2003] QSC 370
PARTIES:	**BRENDA STRINGER** (plaintiff) **v** **FLEHR & WALKER (a firm)** (first defendant) **and** **KYMBERLY GRANT FLEHR** (second defendant)
FILE NO:	SC 5445 of 1998
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	31 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	14 – 15 May, 4 August 2003
JUDGE:	Philippides J
ORDER:	**Judgement for the defendants against the plaintiff**
CATCHWORDS:	LEGAL PRACTITIONERS – SOLICITOR AND CLIENT – whether express or implied retainer – whether evidence sufficient to prove implied retainer – whether plaintiff regarded solicitor as acting on her behalf – whether solicitor advised plaintiff in an intra-family transaction to obtain independent legal advice – whether tacit understanding that solicitor was acting for plaintiff NEGLIGENCE – DUTY OF CARE – WHETHER OWED BY SOLICITOR TO NON CLIENT – whether solicitor owed duty of care to the plaintiff in the absence of any solicitor/client relationship – whether solicitor assumed responsibility towards plaintiff – whether plaintiff relied upon the solicitor to advise *Australian Energy Ltd v Lennard Oil NL* [1986] 2 Qd R 216 *Beach Petroleum v Abbott Tout Russel Kennedy* [1999] NSWCA 408 *Esanda Finance Corp Ltd v Peat Marwick Hungerfords* (1995-1997) 188 CLR 241 *Hardware Services Pty Ltd v Primac Association Ltd* [1998] 1 Qd R 393

Hawkins v Clayton (1988) 164 CLR 539
Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd (1988) 5 BPR 11,110
Irvine v Shaw [1992] ANZ ConvR 83
Meerkin & Apel v Rossett [1998] 4 VR 54
Pergrum v Fatharly (1996) 14 WAR 92
Simmons v Story [2001] VSCA 187
Ta Ho Ma Pty Ltd v Allen (1999) 47 NSWLR 1
Thors v Weekes (1989) 92 ALR 131

COUNSEL:	A Collins for the plaintiff D Clothier for the defendants
SOLICITORS:	Quinn & Scattini for the plaintiff Barry & Nilsson for the defendants

PHILIPPIDES J:

The Claim against the defendants

[1] The plaintiff, Mrs Stringer, is a 63 year old woman residing in Goombungee, north of Toowoomba. She has four sons, one of whom is Moresby John Stringer ("Mr Stringer").

[2] The second defendant, Mr Kym Flehr, was a partner with the Toowoomba law firm Bernays & Bernays from 1983 until June 1992, when he established the firm Flehr & Walker, the first defendant.

[3] The plaintiff claims that in July 1992, she and her son retained Mr Flehr to draw up an agreement for the transfer of the property at Oakey, in respect of which she was the registered proprietor, to her son. It was alleged that it was to be a term of the agreement that her son would pay the plaintiff $65,000, less an amount for costs of stamp duty and outlays, and that the property would be sold no later than 2 years from the date of the transfer. It was alleged that on or about 10 June 1992, Mr Flehr prepared and sent a draft copy of the contract to the plaintiff and her son, but that the plaintiff did not receive the copy sent to her. It was further alleged that on 20 July 1992, the plaintiff and her son attended at the offices of Mr Flehr to finalise the terms of the agreement and on that date executed the contract, thereby transferring the property to John.

[4] The plaintiff alleged that a retainer existed with the defendants, which arose because Mr Flehr had acted for the plaintiff on past occasions, was retained by Mr Stringer to draw up the contract for the transfer of the property in circumstances where the defendants knew she had not retained other solicitors and Mr Flehr had possession of the plaintiff's title deeds to the property.

[5] The plaintiff alleged that by reason of the matters relied on as giving rise to the alleged retainer and by reason of it being obvious to the defendants that the proposed contract would expose the plaintiff to the risk of not recovering the $65,000, that the plaintiff was unaware of the risk, and that the defendants ought

to have known that Mr Stringer was likely to mortgage the property, Mr Flehr owed the plaintiff a duty of care and/or a fiduciary duty.[1]

[6] It is alleged that Mr Flehr breached the implied terms of the retainer and duties in that he failed to advise the plaintiff that "in order to protect her position she ought to obtain adequate security in respect of her interest of $65,000 and/or otherwise record or register her interest in the subject property or that otherwise generally she was exposed to risk of suffering loss". It is claimed that properly advised, the plaintiff would not have executed the contract and/or would have obtained adequate security and would have had her interest in the property secured and otherwise registered.

[7] It was further alleged that after the execution on the contract, Mr Flehr and/or his firm became aware that Mr Stringer was in the process of, or intended to, borrow funds to be secured against the property. It is alleged that Mr Flehr, in breach of retainer and duty, failed to inform the plaintiff of this, in circumstances where Mr Flehr and/or his firm knew or should have known that the plaintiff was exposed to a risk of loss. It was claimed that properly advised the plaintiff would have taken steps to protect her interest in the property by notifying the intending lender of her interest and or by otherwise protecting her interest.

[8] It was not disputed that, on or about 17 December 1992, Mr Stringer became the registered proprietor of the property and that in March 1993 he borrowed moneys secured by way of mortgage for $65,000 over the property. Nor was it disputed that he defaulted under the mortgage, resulting in the property being sold, and that after payment of the mortgage there were no funds to pay any moneys to the plaintiff.

[9] The plaintiff's claim depends on proof of a retainer, i.e. a solicitor/client relationship with the defendants, or that the defendants owed the plaintiff a duty of care in the absence of a retainer.

[10] The defendants deny both that there was any retainer with the plaintiff and that, in any event, any duty of care was owed to her.

The evidence

The circumstances leading to the dealings with Mr Flehr

[11] In 1990, the plaintiff sold the remaining parcel of a rural property known as "Quambi". Mr Flehr acted as her solicitor on that transaction. She then bought a 40 acre property at Oakey for $76,000. Mr Flehr also acted as her solicitor on that occasion. The property included a house which required extensive renovation. The plaintiff was at the time living elsewhere at Crows Nest with her then husband Mr Polzin.

[12] In 1991, the palintiff's son, Mr Stringer[2] came to live at the Oakey property. The plaintiff claimed that in 1991 her son approached her pressurising her to transfer

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1 At trial the alleged fiduciary duty was not pressed and was not the subject of submissions.

2 He was born in 1959 to Richard Burnicle, whom the plaintiff divorced in 1965. In 1973 she married Jack Stringer (who formally adopted her son John), but the marriage broke down in 1980, and in 1992, the plaintiff married Alan Polzin from whom she separated in 1993.

the property into his name. She said that he was persistent and bullied her in a physical way, reducing her to tears. The plaintiff said that eventually she agreed to her son staying at the Oakey property rent free, and that in exchange, her son would do up the house, and that when the property was sold, he would retain any profit over the $76,000 that the plaintiff had paid for it. The plaintiff said that at first, her son agreed with this arrangement, but that later he told her that he wanted the property transferred into his name. The plaintiff said that after further bullying she agreed to transfer the property into her son's name, on the basis that after two years, he would sell it and pay her $65,000 out of the proceeds of sale. She said he also agreed to pay for half of the legal fees associated with the transfer and sale.

The May instructions to Mr Flehr

[13] The plaintiff said that in May 1992, after having agreed to transfer the Oakey property, she told her son to see Mr Flehr to sort out the transfer, because, she said, "he is my solicitor and he has got my deeds".

[14] Mr Flehr's evidence was that Mr Stringer contacted him on 20 May 1992, giving him instructions in relation to a proposed transfer of a property from his mother to him. Mr Flehr agreed to act in the transaction. Mr Flehr said that it was not indicated that he was to act on behalf of the plaintiff and that he did not regard himself as acting for her. Mr Flehr said that at that time and prior to subsequently meeting the plaintiff in July 1992, he had no recollection of who she was, and had no recollection of having acted on her behalf as a solicitor. (He remembered Mr Stringer from his involvement with coaching Rugby Union).

[15] Mr Flehr said that during the call Mr Stringer mentioned that the reason for the proposed transfer was that he had put $35,000 towards the purchase of the Oakey property, and that as his mother was separated from her husband, he did not want his money tied up in possible divorce proceedings. Mr Flehr gave evidence as to the file note compiled by him of the telephone conversation. His evidence as to the file note was that it recorded, *inter alia*, the following:

> "Will be no consideration on transfer but client has to pay all costs and stamp duty - but will be term that when client sells will have to pay his mother $65,000 less total amount of costs, stamp duty and other outlays. Client does not want his money … Put the consideration of 120,000 but express balance of amount as forgiven in consideration of moneys loaned to vendor by purchaser from the past. – Deed here – do ASAP. Do contract and transfers all at once and send out for execution. Client to get valuation."

[16] Mr Stringer gave him his details. Mr Flehr said he was given the details "Brenda Stringer PO Box 30 Oakey".

The draft contract

[17] In June 1992, Mr Flehr proceeded to draft a contract. The draft contract identified John Stringer as the purchaser and his solicitors as Bernays & Bernays. Mr Flehr said this was because he drafted the contract while he was still with that firm. The plaintiff was specified as the vendor, and no details were inserted for

the plaintiff's solicitor, because, Mr Flehr said, he did not know who was acting for her. Although the contract recorded that the instrument of title was with Bernays & Bernays, Mr Flehr considered that that was something which his secretary may have ascertained and inserted at a later stage. No details were inserted for the parties' addresses.

[18] The draft contract included the following special condition:

> "The consideration under this contract is the sum of one dollar ($1.00) due to the natural love and affection the vendor bears to the purchaser, her son, PROVIDED that it is agreed between the parties that should the purchaser subsequently sell the subject property he will pay to his mother on settlement of such resale the sum of SIXTY FIVE THOUSAND DOLLARS ($65,000.00) LESS one half of all legal costs, stamp duties and outlays in respect of this sale. The balance of any consideration of the subsequent resale of the property by the purchaser herein will be forgiven by the vendor herein in consideration of moneys previously loaned by the purchaser to the vendor and otherwise in consideration of the natural love and affection which the vendor beard her son, the purchaser."

The June 1992 correspondence

[19] Mr Flehr said that he sent a copy of the draft contract, under cover of a Bernays & Bernays letter dated 10 June 1992, to both Mr Stringer and the plaintiff using the PO Box 30, Oakey mailing address for both. The letter addressed to Mr Stringer stated:

> "re: PROPOSED PURCHASE FROM B. STRINGER
> We refer to instructions received from you and enclose form of draft contract, prepared as we understand your instructions.
> Would you please confirm that our understanding of the arrangement as set out in Special Condition 1 of the contract is correct.
> Would you please confirm that our understanding of the arrangement as set out in Special Condition 1 of the contract is correct.
> Could you also advise as to whether there is to be any arrangement between the parties in respect of security for the sum of $65,000 less costs referred to.
> Please also confirm the date for completion of the contract.
> We look forward to your further instructions."

[20] The letter addressed to the plaintiff stated:

> "re: PROPOSED SALE TO J M STRINGER
> We refer to instructions received from your son, John Stringer, and enclose form of draft contract, prepared as we understand his instructions.
> Could you also advise whether there is to be any arrangement between the parties in respect of security for the sum of $65,000.00 less costs referred to.
> Given the nature of the transaction and a number of recent Queensland Supreme Court decisions on the point, we are duty

> bound to advise you to seek independent legal advice as to the desirability of this transaction and as to whether the obligations to pay the above money should simply remain a contractual obligation or as to whether it is to be covered by any form of security.
> We look forward to your advice."

[21] The plaintiff denied ever receiving a letter from Mr Flehr dated 10 June 1992 or any correspondence concerning the draft contract. The plaintiff's evidence was that, although her son may have discussed the contract with her prior to the meeting of 20 July 1992, she had never seen a copy of the contract before that meeting.

Mr Flehr's evidence as to the 20 July 1992 meeting

[22] Mr Flehr gave evidence that he received a further telephone call from Mr Stringer on 20 July 1992 (after he had left Bernays & Bernays). Mr Stringer gave instructions that the special condition in the contract was to be amended to refer to the amount payable to the plaintiff as $65,000, less half of all legal fees, stamp duty and outlays. Mr Stringer said that he and his mother would be in that afternoon. Mr Flehr said that later that day the plaintiff and her son arrived at his office together and that the plaintiff had a copy of the contract with her.

[23] During the meeting, an amendment was made by hand to the special condition of the contract to specify that Mr Stringer would pay half the costs and notations were also made inserting the parties' addresses, the plaintiff's being recorded as "PO Crows Nest" and her son's as "PO Box 30 Oakey". Both the contract and transfer were then executed and witnessed by Mr Flehr.

[24] Mr Flehr gave evidence concerning a file note he compiled during the meeting. Mr Flehr had previously given evidence concerning that file note in 1997 in District Court proceedings brought by the plaintiff against her son seeking a declaration as to her interest in the Oakey property. The transcript of the evidence given by Mr Flehr in District Court reveals that his evidence concerning the meaning of the notations in the diary note was:

> "Conversation John Stringer and Mrs Brenda Stringer, instructions to complete conveyance on spot. Queried client re stamp duty. He will drop in valuation, expect at about 100,000 plus will pay stamp duty and costs. We prepare quote for form. NB check location of title deed. Question security and time limit. Confirmed clients. Okay as is. Mrs Stringer in dispute with ex husband and doesn't want asset obvious. Has another solicitor acting for her. Attend on execution of contract and we to complete ASAP."

[25] In giving evidence in this Court, Mr Flehr explained that in giving this evidence in the District Court he had erroneously read the notation "conf" in the file note as meaning "conversation", whereas it meant "conference". Mr Flehr said that the entry "NB check location of title deed" referred to the fact that, as he recalled it, the parties did not know where the title deed was, and were going to check its location. Mr Flehr said that he did not have the title deed at the time, and that he believed that the plaintiff subsequently delivered it to his receptionist. He said

that he did not then recall that Mr Stringer had previously mentioned that the deed was with Bernays & Bernays.

[26] As to the diary entry "Question security and time limit", Mr Flehr said that during the meeting he raised the issue that the special condition of the contract made no provision for security for the plaintiff, nor was there any time limit about when a sale would happen. Mr Flehr's evidence was that he told the plaintiff words to the effect of, "You appreciate that this transaction doesn't provide any security for the outstanding moneys to be paid and there's no time limit as to when this sale is to occur. Those are important issues in respect of which you should get independent advice". Mr Flehr conceded that the file note did not record that he told the plaintiff to get independent legal advice and said that he may have used words to the effect, "You should see another solicitor", rather than the words "You should get independent advice". However, he said that the sense conveyed was that he could not advise the plaintiff on the clause.

[27] Mr Flehr said that when the issues of security and time limits were raised, the plaintiff became "testy" with him and dismissive of his concerns. He said that she replied to the effect: "I'm right with John" and "if you can't trust your son, who can you trust?" Mr Flehr said that his impression was that the plaintiff and her son were close.

[28] Mr Flehr gave evidence concerning the next entry in the file note "confirmed cl. OK as is". He explained that he used the abbreviation "cl" for both "client" and "clause", so that at times his notes could appear confusing. Although the transcript of Mr Flehr's evidence in the District Court concerning this file note reveals that he read the notation "confirmed cl" on two occasions as "confirmed clients", Mr Flehr said that he did not believe that he would have said "clients" in the District Court,[3] because the notation was "cl" and not the plural. He said that he did not believe that the notation "cl" meant clients and that put in context the notation "cl" made more sense as meaning "clause". Mr Flehr pointed out that elsewhere in the same diary note the abbreviation "cl" occurred and his evidence in the District Court had been that that abbreviation meant "client" in the singular, which he maintained was clearly a reference to John Stringer.

[29] Mr Flehr said that his understanding of the other entry on the diary note "has other solicitors acting for her" was that the plaintiff had already been advised on the suitability of the special condition and that it was not his concern. Mr Flehr said that he understood that the plaintiff was referring to having other solicitors acting for her in relation to the conveyance, and that she was not referring to the dispute with her ex husband. He rejected the suggestion that the note "has other solicitors acting for her" came from Mr Stringer, being adamant that it came from the plaintiff. Mr Flehr said that he did not ask the plaintiff who those solicitors were, as the only issue to be determined from his point of view was whether or not the special condition was acceptable. Mr Flehr did not accept the suggestion that it was proper practice in the circumstances to find out who the other solicitors were.

[30] The final entry on the note read: "We to complete ASAP". Mr Flehr said he could not remember who gave him this instruction, but said that there was an

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3 But see s 10 *Record of Evidence Act 1962.*

urgency factor with which both parties agreed. Mr Flehr said that throughout the conference, the plaintiff was positive and in control and that it did not appear that the plaintiff was being overborne by her son.

[31] Mr Flehr said that he did not regard the plaintiff as his client, because he had written to her saying that he could not act for her, and that when he left Bernays & Bernays, he had taken an agreed list of files with him, which included Mr Stringer, but not the plaintiff. Mr Flehr said that at no time did the plaintiff raise with him that she wanted him to advise her in relation to the transaction. He denied that when he advised her to seek other solicitors that she responded with words to the effect that she did not need to because he was her solicitor.

[32] Mr Flehr rejected the suggestion that, even if there was not a retainer, the plaintiff was relying on him. He said that it was "crystal clear" in his mind that the plaintiff was not relying on him. He said that he gathered from what she said that she had already obtained independent legal advice, and took the view that given that the conveyance was to be instantaneous and intra-family (there were to be no searches apart from a check title search, no adjustments of rates and the like), there was nothing further for another solicitor to do, other than be satisfied with the terms of the contract.

[33] Mr Flehr accepted that if the plaintiff had been his client in July of 1992, or if the plaintiff to his knowledge perceived that she could rely on Mr Flehr as her solicitor, then to act for both the plaintiff and Mr Stringer would not be in accordance with standard practice. Mr Flehr said that if at the July meeting there had been a conflict between Mrs Stinger and her son, then he would have sent them both away and refused to complete the conveyance on the spot. Mr Flehr disputed that it was accepted practice in 1992 to have a client sign an acknowledgement that they have been advised to get independent solicitors.

The plaintiff's evidence as to the 20 July 1992 meeting

[34] The plaintiff said that on 20 July 1992 she and her son went to see Mr Flehr at the offices of Flehr & Walker. The plaintiff said that her son was already at Mr Flehr's office when she arrived. Mr Flehr showed her the contract, which she said she read for the first time. She said that she then spoke to her son about his agreement to pay half of the legal fees and Mr Flehr made hand written amendments to the special condition of the contract to reflect the agreement as to costs. The plaintiff said that her son did most of the talking throughout the meeting. She said that it was her son who was keen to get the transfer through quickly, denying that she herself was in any hurry. [4]

[35] The plaintiff denied that Mr Flehr raised the issue of whether there was to be security for the $65,000. While she did not recall having any conversation with Mr Flehr as to her "trust" in her son, the plaintiff accepted that at the time, she thought that her son would keep his word when it came to selling the property within two years. The plaintiff denied that she had said that the transaction was to take place as soon as possible, or that her son had mentioned it in her presence.

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[4] In her affidavit in the District Court proceedings the plaintiff gave contradictory evidence.

[36] The plaintiff conceded that when she went to see Mr Flehr in July 1992, she was experiencing matrimonial difficulties with Mr Polzin and considered that she may eventually separate from her husband.[5] She denied raising this with Mr Flehr or discussing transferring the property to her son, so that the property was not available in a divorce settlement, but indicated that her son had raised the topic with her and mentioned it at the meeting.

[37] In giving evidence, the plaintiff conceded that Mr Flehr told her "I think you ought to get another solicitor", but maintained that she had replied, "But you're my solicitor. You've got my deeds". The plaintiff said that nothing further was said on the issue of her seeking independent legal advice. In the plaintiff's statement compiled in respect of the District Court proceedings by Mr Keogh, her then solicitor, she stated, "It was in fact my suggestion that John went to see Kym Flehr because Kym Flehr had acted for me in previous conveyancing. He was my solicitor. I assumed that Kym Flehr would look after my interest in the sale. Kym Flehr had the certificate of title". The statement also recorded, "I do recall Flehr telling me that perhaps I should get independent legal advice but I thought that because he was my solicitor he would look after my interests." (Mr Keogh gave evidence that had the plaintiff told him that she had told Mr Flehr, "You are my solicitor" in reply to Mr Flehr telling her to get other solicitors, that statement would have also been recorded in the statement he obtained from the plaintiff.)

[38] The plaintiff conceded that she never asked Mr Flehr to act for her, or that he said that he would. Her evidence was that she acted on the understanding that Mr Flehr was also her solicitor. She said that she read the whole of the special condition, but never thought to raise the fact that it said that the transfer was in consideration for money loaned by her son to her, a matter she disputed in the District Court proceedings. The plaintiff also agreed that she failed to make mention of the agreed 2 year time limit in the meeting with Mr Flehr.

[39] The plaintiff said that she would not have entered into the agreement had she known or had she been told that she was at risk of her son mortgaging the property, nor if she had received advice from Mr Flehr that she should not enter into the agreement. She also said that if Mr Flehr had told her that he would not proceed with the transfer unless she saw another solicitor, then she would have sought independent advice.

Events following the July 1992 meeting

[40] The plaintiff said that, not long after she signed the contract, she visited Mr Flehr's office to pick up some papers, at which time Mr Flehr mentioned that he thought Mr Stringer might be going to mortgage the land, because "Primac" had called him about obtaining the deeds. In the District Court proceedings, the plaintiff gave evidence that it was a couple of years after the sale that she discovered the property had been mortgaged. In her affidavit filed in the District Court action she stated that she heard in 1995 that her son had mortgaged the

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[5] The plaintiff's affidavit material in the Family Court proceedings for property settlement involving Mr Polzin indicated that the plaintiff and Mr Polzin were undergoing a period of separation during late July 1991 to May 1992 and that they separated on 18 July 1993.

property and that soon after that she went to see Mr Flehr, who confirmed that the property had been mortgaged.

[41] The plaintiff said that if Mr Flehr had advised her to lodge a caveat, because he suspected that her son might mortgage the property, she would have done so.

[42] Mr Flehr disputed that he had had a conversation with the plaintiff to the effect alleged. He acknowledged that on 6 August 1992, his secretary had taken a call from Primac to the effect that Mr Stringer was obtaining finance and that the transfer document was required, but said that he was not personally aware of it. There was evidence that on 23 November 1992, Primac had requested the Certificate of Title. A file note of a telephone call states: "CT [Certificate of Title] to go to Primac … but get client's authority first". That call was not taken by Mr Flehr. In January and February 1993, Primac wrote to Flehr & Walker requesting the title deed in respect of a property mortgage offered by John Stringer. On 3 March 1993, Flehr & Walker forwarded the title deed to Primac. Mr Flehr said that he did not believe that he personally knew about any of that correspondence and maintained that he did not know about the mortgage until the District Court proceedings.

[43] The plaintiff said that a couple of years after the transfer, she mentioned to a friend that she did not know whether her son had mortgaged the Oakey property. He recommended that she see his solicitor, Mr Keogh, which she did. In December 1995, Mr Keogh lodged a caveat over the property, by which time the property had already been mortgaged.

[44] The plaintiff then commenced proceedings seeking declarations in the District Court as to her interest in the property. In 1997 a declaration was made that the property was then held on trust for the benefit of the plaintiff and her son. The property was sold by the mortgagee pursuant to its power of sale. It is not disputed that the plaintiff has not received any money from either the sale or her son.

Prior dealings with Mr Flehr

[45] The plaintiff admitted that at the time that she went to see Mr Flehr in July 1992, he was not her solicitor in any other matter. The plaintiff's evidence was that the Oakey deeds were then with Bernays & Bernays and that she thought that Mr Flehr had taken them with him when he started his own practice.

[46] The plaintiff gave evidence of a number of contracts, prior to 1992, in respect of which Mr Flehr, then working for Bernays & Bernays, had acted as her solicitor. These concerned the purchase of a house in 1989 in Acland, the two contracts concerning the sale of Quambi in 1990, and the purchase of the property at Oakey in 1990. The plaintiff conceded she had also used other solicitors, for example in her matrimonial dispute with Mr Jack Stringer in 1981. While she sought advice from Ms Feil of Flehr & Walker in May 1993 about her matrimonial difficulties with Mr Polzin, she also consulted other solicitors about that divorce. Ms Feil also acted for the plaintiff in December 1993 in relation to the purchase of land at Goombungee, in which she now resides.

[47] The plaintiff admitted that her past involvement with Mr Flehr had concerned a series of discrete sales and purchases of properties and that Mr Flehr did not have any riding instructions to act for her in 1992.

Evidence of Mr Gregory

[48] Mr Gregory, a solicitor since 1968, who has previously given expert evidence in respect of conveyancing and property law, was called as an expert by the plaintiff. He prepared a report on the situation where a solicitor who had historically acted for a family was asked to act for one member of that family in an intra-family conveyance of the type in issue in this case. Mr Gregory's report stated that a solicitor receiving instructions to act in an intra-family transaction would be very conscious of the need to avoid being in a position where there was a conflict. He stated that he had advised parties in intra-family transactions that involved the creation of a debt that unless there was an overwhelming reason against it, that debts should be secured by a registered first mortgage, deposit of title deeds or by a bill of sale.

[49] Mr Gregory's evidence was that it was accepted practice, when acting for one party to an intra-family transaction, for a solicitor to indicate that he could not act for both of parties and that one party needed to obtain independent advice. While acknowledging that a lawyer could not force someone to seek independent advice, Mr Gregory said that if it appeared that a transaction was likely to be prejudicial to the person that the lawyer was not representing, then the point should be pressed vigorously. His evidence was that if the option was still refused, the solicitor should require the party to sign an acknowledgement as to being so advised and that they had chosen not to follow the advice.

[50] Mr Gregory said that in an intra-family situation, where the family member for whom the solicitor was not acting indicated that they wanted to complete the transaction immediately and wanted the solicitor to act on their behalf, the solicitor should refuse to proceed, advising that there were possible disadvantages in this transaction and that independent legal advice was required. Mr Gregory said that if such a party indicated that they had sought independent advice, he would accept that, but would require them to sign an acknowledgement that they had been advised to take independent advice, that they had done so, and they were signing the documents having had that advice.

Issues of credit and reliability

[51] Counsel for the defendants submitted that in resolving the significant conflicts between the evidence of the plaintiff and Mr Flehr, regard had to be given to the fact that there were many discrepancies on important issues in the evidence given by the plaintiff in these proceedings, the property settlement proceedings in the Family Court and the subsequent District Court proceedings against Mr Stringer. It was submitted that the discrepancies indicated that the plaintiff's evidence was unreliable and that where there was a conflict in the evidence of the plaintiff and Mr Flehr, the evidence of Mr Flehr ought to be preferred.

[52] Examples of the discrepancies pointed to by the defendants are as follows. The plaintiff gave affidavit evidence in Family Court proceedings against Mr Polzin in March 1995, that her son had rendered significant assistance to her in the past

for which he was entitled to be compensated and that the transfer of the Oakey property to him was in part as compensation for that assistance. The effect of her evidence was that he had significantly improved the property. The plaintiff conceded that, prior to the Family Court proceedings between the plaintiff and Mr Polzin, Mr Polzin was unaware that she owned the Oakey property and that in those proceedings Mr Polzin had questioned why the property had been transferred into her son's name. The defendants submitted that the plaintiff's evidence was designed to demonstrate that the transfer of the property was a legitimate transaction for consideration. However, in the District Court trial between the plaintiff and her son in 1997, where, the defendants noted, the existence of a claim to the property by Mr Stringer was detrimental to the plaintiff's case, the plaintiff maintained that her son had no legal or moral entitlement to the property and that he had approached her arguing that if the property remained in her name, Mr Polzin might get the property in the event of a marriage breakdown (a matter not alluded to in her Family Court affidavit). The plaintiff also maintained in this action that her son had no entitlement to the property.

[53] The defendants also pointed to the fact that in the District Court proceedings, where the plaintiff was attempting to retrieve some interest in the property from Mr Stringer, her evidence was that it had been agreed that the property would be sold in 2 years. Yet, in the Family Court proceedings, she gave no evidence of such a time limit. Furthermore, it was noted that the only explanation offered by the plaintiff as to why she did not mention the agreed time limit to Mr Flehr in 1992 was that she trusted her son to honour their agreement.

[54] The defendants also pointed to discrepancies in the plaintiff's evidence in this Court and the District Court as to whether she received the letter of 10 June 1992 and various aspects of the July 1992 meeting. These are dealt with below.

Findings of fact

[55] It was not disputed that Mr Flehr sent the letter of 10 June 1992 to the plaintiff and that a draft contract was attached to it. The Statement of Claim was only amended during the trial to withdraw a plea that the draft contract was provided to the plaintiff on or about 10 June 1992. The plaintiff denied receiving it or any other correspondence concerning the contract from Mr Flehr. The evidence was that the original letter addressed to the plaintiff was not returned to Bernays & Bernays. The plaintiff conceded that in the District Court proceedings she gave evidence of having received a letter from Mr Flehr prior to the 20 July 1992 meeting to say that the contract was ready, but maintained that she was mistaken in giving that evidence. She maintained that the letter to which she had referred in the District Court was one which requested her signature to transfer her files from Bernays & Bernays to Mr Flehr. I accept the defendants' submission that an examination of the plaintiff's evidence given in the District Court indicates that the letter to which she was there referring was one concerning the contract.

[56] The basis for the plaintiff's insistence that she did not receive the letter was that the letter was sent to the Oakey mailing address and that she did not recall receiving it. The plaintiff disputed that the Oakey mailing address had ever been her mailing address, stating that it was only her son's mailing address. However she conceded that she had in fact received mail (an insurance note for the Oakey

property), which had been addressed to her using the Oakey mailing address. The plaintiff also disputed that it was convenient for her to have correspondence concerning the Oakey property, of which Mr Polzin was then unaware, sent to the Oakey mailing address, saying that she had her own private Post Office Box in Crow's Nest. On reviewing the evidence and taking into account matters of credit, I find that the plaintiff did receive the letter and the draft contract attached to it.

[57] As to the meeting of 20 July 1992, I accept Mr Flehr's evidence that when the plaintiff attended his office she did so with her son and that she had a copy of the draft contract. The plaintiff accepted that Mr Flehr told her at that meeting that she should get another solicitor. This recommendation was consistent with Mr Flehr's letter to the plaintiff of 10 June 1992, which advised her to seek "independent legal advice". Indeed, in the plaintiff's statement prepared for the District Court proceedings, the plaintiff also stated that Mr Flehr had told her that she ought to get "independent legal advice". I accept Mr Flehr's evidence that he told the plaintiff that the contract made no provision for security and did not impose any time limit for sale and that she ought to get independent legal advice about the contract and those matters.

[58] A critical matter of dispute between Mr Flehr and the plaintiff concerned whether, after Mr Flehr indicated to the plaintiff that she ought to get independent legal advice, the plaintiff told Mr Flehr of her understanding that he was her solicitor. The plaintiff did not mention having made such a statement when she gave evidence in the District Court proceedings. The most that the plaintiff said on that occasion was that she believed that Mr Flehr would protect her interests. In the plaintiff's affidavit sworn in the District Court proceedings, the plaintiff merely stated that Mr Flehr advised her "that she could have her own solicitor if she wished", but that she "thought that because he had previously acted for [her] that he was going to protect [her] interests". Her oral evidence in that Court was to like effect. I accept the submission made on behalf of the defendants that it is fair to infer from the evidence given by Mr Keogh that the plaintiff did not tell him, when he was taking a statement from her, that she told Mr Flehr of her understanding that he was her solicitor.

[59] On this issue, I consider that Mr Flehr's recollection, that the plaintiff did not assert during the meeting that Mr Flehr was her solicitor, is to be preferred.

[60] I also accept Mr Flehr's evidence that the plaintiff indicated to him that she had other solicitors acting for her in respect of the contract and had already obtained advice from them as to the draft contract.

The issue of whether a retainer existed

The plaintiff's submissions

[61] The plaintiff contended that the evidence indicated that there was in existence an express or implied retainer. The plaintiff contended that even if an express retainer was not found to exist, the evidence indicated a tacit understanding or agreement that a relationship of solicitor and client existed between the plaintiff and the defendants. In that regard, reliance was placed on a line of authority, of

which *Pergrum v Fatharly*[6] was one, holding that a solicitor/client relationship may in some circumstances be inferred from the surrounding circumstances.

[62] Counsel for the plaintiff pointed to a number of indicia, which it was submitted were consistent with a solicitor/client relationship. It was argued that the plaintiff understood that Mr Flehr was her solicitor, who was acting in her interests; Mr Flehr or his firm had previously acted for her and Bernays & Bernays held the deeds to the subject property in safe custody. While the circumstance of the holding of the property deed was not relied upon as proof of the existence of a retainer, it was said to be a strong indicia, given the other background facts, that a retainer had existed.

[63] Counsel for the plaintiff pointed to the plaintiff's evidence that she directed her son to go to Mr Flehr because she considered Mr Flehr to be her solicitor, and evidence that she continued to so regard him after the event, initially attending upon his firm in respect of her matrimonial difficulties with Mr Polzin. The plaintiff also pointed to Mr Flehr's preparation of the contract in accordance with what he understood to be the instructions of both parties, his knowledge that an intra-family transaction was involved, which should have suggested that the parties would use the same solicitors, and his sending the draft contract to both parties.

[64] It was contended that Mr Flehr's conduct of sending the plaintiff the letter of 10 June 1992 supported the inference that Mr Flehr was acting for her. It was argued that it was significant that in the letter to the plaintiff Mr Flehr did not state that he did not act for her, but rather that she should seek independent legal advice. It was contended that even if the plaintiff received that letter, it "did not disclaim that he could not act for her".

[65] In addition, the plaintiff referred to the attendance of both parties on Mr Flehr at his offices in respect of the "on the spot" completion and execution of the contract, his taking instructions from both parties in respect of the changes to the contract, his taking instructions from both parties (or in the presence of both parties) in respect of such matters as stamp duty and valuations, his raising a concern to both parties in respect of security and the time limit for the sale of the property and his witnessing the execution of the contract and the transfer. Reliance was placed on evidence that Mr Stringer gave in the District Court action that while he had initially gone to Bernays & Bernays in May 1992 (when Mr Flehr was a partner), he had returned to Bernays & Bernays to obtain further legal advice, because he thought Mr Flehr was his mother's solicitor and his solicitors were Bernays & Bernays. (That evidence was of course not tested or clarified by cross examination in this Court).

[66] Counsel on behalf of the plaintiff urged that it was apparent from Mr Flehr's file notes and his evidence in the District Court that he knew that the plaintiff was relying on him. Particular emphasis was placed on Mr Flehr's use of the words "clients" in interpreting his file note of the meeting of 20 July 1992 when giving evidence in the District Court.

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6 (1996) 14 WAR 92. See also *Meerkin & Apel v Rossett* [1998] 4 VR 54 and *Simmons v Story* [2001] VSCA 187.

[67] It was said that Mr Flehr's recommendation at the July meeting to "see another solicitor" was a recognition of the otherwise existing retainer. It was argued that, in the absence of an express disclaimer by Mr Flehr (i.e. more than "you should see another solicitor") the circumstances were such that it was understood that the plaintiff was receiving advice from Mr Flehr and that he would act in her interests. It was also said that whatever recommendations were made to seek other legal advice, the evidence pointed to Mr Flehr accepting that for the purpose of the preparation of the contract he was acting for both parties.

The defendants' submissions

[68] In disputing that the defendants were retained expressly to act on the plaintiff's behalf in connection with the transaction in question, the defendants pointed to there being no evidence of any request by the plaintiff to the defendants to provide legal services to her or any express agreement by the defendants to do so.

[69] Furthermore, counsel for the defendants contended that the evidence was not such that the relationship of solicitor and client could reasonably be inferred. Counsel pointed to that fact that Mr Flehr wrote to the plaintiff on 10 June 1992 referring to instructions from Mr Stringer (not by or on behalf of the plaintiff) and to his having on two occasions recommended to the plaintiff (but not to Mr Stringer) that she should obtain independent solicitors. It was argued that the recommendation at the July meeting that the plaintiff obtain independent advice was consistent only with a lack of intention to represent the plaintiff, particularly in circumstances where she had stated they had other solicitors and corresponding advice was not given to Mr Stringer. In addition, it was emphasised that the draft contract prepared by Mr Flehr and sent to the plaintiff nominated Bernays & Bernays, Mr Flehr's then firm, as solicitors for Mr Stringer and not as solicitors for the plaintiff.

[70] It was contended that no assumption of responsibility to act as the plaintiff's solicitor could be drawn from the fact that Mr Flehr wrote to the plaintiff asking her to confirm her understanding of the agreement, nor from the fact that he had witnessed the plaintiff's signature on various documents. The former was said to be something which one would normally ask of the other party, (whether legally represented or not) and the latter a purely mechanical task. As to the issue of previous representation, it was contended that Mr Flehr was involved in isolated transactions on her behalf on isolated occasions and had not represented her for some time before the events in question. The defendants thus argued that to characterise Mr Flehr as the plaintiff's solicitor on the basis of the history of previous representation was an unjustified attempt to demonstrate a relationship which did not exist.

[71] Apart from the evidence of the plaintiff (which it was argued ought to be rejected), the defendants contended that the plaintiff's case was essentially that a retainer was to be implied from the fact that Mr Flehr was her solicitor and that he did not inform her, in terms, that he was not acting as her solicitor on this occasion. It was contended that it was impossible to infer from those facts that the parties had entered into contractual relations

Did a retainer exist?

[72] It is clear that in addition to a retainer arising by express agreement, a retainer may be inferred from the acts and conduct of the parties as well as or in the absence of their express words. As was stated in *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd*,[7] the question in the latter class of case is whether the conduct of the parties viewed in the light of the surrounding circumstances shows a tacit understanding or agreement. The conduct of the parties must be capable of proving all the essential elements of an express contract. A retainer may thus be presumed in circumstances where it is proved that the solicitor and client relationship in fact existed. However, in such cases the de facto relationship must be a necessary and clear inference from the proved facts before a retainer will be presumed.[8]

[73] In *Pergrum v Fatharly*,[9] Anderson J considered the principles concerning the implication of a retainer stating:

> "When both parties to a transaction consult the same solicitor and together give him the information needed to prepare the documents in which their respective rights and obligations are to be set out and the solicitor accepts responsibility to prepare the documents without any indication that he cannot fully discharge his professional duties to them both there is a strong bias towards finding that the solicitor tacitly agrees to act for both parties and to undertake the usual professional responsibilities to them both … . In the absence of a clear indication by the solicitor that the solicitor does not accept one of the parties as his client it is natural in such a case to assume both are relying on him for professional advice and assistance. This follows from the mere fact that both have consulted him. There may be other circumstances which show that there is no reliance by one or other of the parties on the solicitor, but, if not, reliance should be inferred as a fact. And when a solicitor accepts responsibility to do professional work requiring special knowledge and skill and there is in fact a reliance on him to apply his expert knowledge and skill in the performance of that work, there exists 'the elements which lie at the heart of the ordinary relationship between a solicitor and his client …' See *Hawkins v Clayton* (1988) 164 CLR 539 at 578 per Deane J. …
>
> This does not mean a solicitor whose services are sought by both parties is bound to accept that he is to serve both parties. He can refuse to do so and elect to act for one party only. This requires a very clear statement by the solicitor that this is to be his position."

[74] In the present case, there is no evidence to support the existence of a retainer arising by express agreement. Nor, applying the principles discussed in *Pergrum*

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7 (1988) 5 BPR 11,110 at 11,117; *Pergrum v Fatharly* (1996) 14 WAR 92, at 94.

8 *Australian Energy Ltd v Lennard Oil NL* [1986] 2 Qd R 216 at 237; *Pergrum v Fatharly* (1996) 14 WAR 92, at 94. See also *Meerkin & Appell v Rosset* [1998] 4 VR 54 at 62 and *Simmons v Story* [2001] VSCA 187 at [23].

9 (1996) 14 WAR 92 at 102. *Pergrum v Fatharly* was referred to with approval in *Meerkin & Appell v Rosset* [1998] 4 VR 54 (where it was distinguished) and in *Simmons v Story* [2001] VSCA 187.

v Fatharly, do I consider that the evidence indicates that a retainer arose by tacit agreement.

[75] It is apparent from Mr Flehr's May 1992 diary note of the initial conversation with Mr Stringer that Mr Flehr only regarded Mr Stringer as his client; that diary note only refers to Mr Stringer as the "client".[10] The letters of 10 June 1992 confirm this view. The letter addressed to Mr Stringer indicated that he was regarded as the client and his instructions were sought. By contrast, the letter addressed to the plaintiff referred to Mr Flehr having received instructions from her son and recommended in express and clear language that she obtain independent legal advice as to the desirability of the transaction and the issue of whether there ought to be security in respect of the debt owed by her son.

[76] That Mr Flehr continued to regard only Mr Stringer as his client and not the plaintiff and communicated that to the plaintiff in sufficiently clear terms is also apparent from what transpired at the July 1992 meeting. As I have said, I accept that at that meeting the plaintiff was told by Mr Flehr that the contract did not provide for security or for a time limit for the sale of the property and that those were matters on which she should get independent legal advice. As I have also stated, I do not accept that the plaintiff asserted on that occasion that she regarded Mr Flehr to be her solicitor. Nor, given her statement that she had consulted other solicitors about the contract, was it unreasonable for Mr Flehr to have taken the view that the plaintiff did not regard him as her solicitor for the purpose of advising on the terms and desirability of the contract.

[77] Much emphasis was placed by counsel on behalf of the plaintiff on Mr Flehr's evidence in the District Court proceedings as to the meaning of his notations in his diary note of the July 1992 meeting; in particular, on the fact that Mr Flehr had interpreted the abbreviation "cl" in his diary note as meaning "clients". In fact the abbreviation "cl" appears twice in the same diary note. It is significant that in giving evidence in the District Court, Mr Flehr interpreted the abbreviation "cl" where it first appears in the diary note as meaning "client" in the singular. Notwithstanding the District Court evidence given by Mr Flehr, I accept Mr Flehr's evidence in this Court that the abbreviation "cl" where it appeared in the notation "confirmed cl" meant "confirmed clause". I consider that Mr Flehr's District Court evidence as to the meaning of the notation "confirmed cl" was simply erroneous; it was not the only error Mr Flehr made in his District Court evidence as to the meaning of abbreviations in that diary note.[11]

[78] On behalf of the plaintiff it was contended that, by telling the plaintiff that she should get independent legal advice, Mr Flehr did not sufficiently indicate his position that he was only acting for Mr Stringer, and that in addition what was required was an express statement that he was not acting for her. I cannot accept that proposition. Given the recommendation to obtain independent legal advice and the findings that the plaintiff did not assert that she regarded Mr Flehr as her solicitor, but rather that she indicated that she had other solicitors acting for her who had advised her in respect of the contract, I consider that it was sufficiently

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10 This is supported by Mr Flehr's evidence in District Court concerning this diary note.

11 Mr Flehr explained that in his evidence in the District Court he had erroneously read the notation "conf" in the file note as meaning "conversation", whereas it actually meant "conference".

apparent to the plaintiff that Mr Flehr was not accepting responsibility for advising the plaintiff as to the desirability of the contract and the issue of security and that the plaintiff was not relying on Mr Flehr in that regard. In those circumstances no implied retainer arose between the plaintiff and the defendants in respect of the contract.

The existence of a duty of care in the absence of a retainer

The plaintiff's submissions

[79] On behalf of the plaintiff it was argued that the absence of a retainer between the parties did not preclude the imposition of a duty of care and that in this case a duty of care was owed by the defendants to the plaintiff. Reliance was placed on the following passage of *Halsbury's Laws of Australia*[12] as a statement of the relevant principles:

> "A lawyer who is acting on behalf of a client may, in his or her professional capacity, be liable for negligence to a person who is not a client (a 'non client'). Generally, for a duty of care to exist there must be a relationship of sufficient proximity between the lawyer and the non-client, and a reasonable foreseeability of loss or damage to a class of persons to which the non-client belongs. Whether a lawyer owes a non-client a duty of care depends upon the circumstances of each case. In determining whether or not a duty of care exists in a particular case, relevant considerations include:
>
> (1) the assumption of responsibility towards the non-client by the lawyer and the non-client's reliance on the lawyer having so acted;
> (2) contemplation that the non-client was likely to be affected by the lawyer's conduct; and
> (3) the degree of conflict, if any, between the lawyer's conduct in relation to the non-client and his or her duties to the client.
>
> The terms of the retainer may be a factor in determining the existence and scope of a duty of care. The standard of care to be observed by the lawyer is that of the ordinarily skilled and reasonably careful practitioner.
>
> Ordinarily, a lawyer will not owe a duty of care to a non-client in either contentious or non-contentious matters. However, a lawyer may owe a duty of care to a potential client, to a non-client who is closely related to a client and has similar interests to the client, and to a person who was a former client." (footnotes omitted)

[80] In addition, reliance was also placed on the following statement of principles from *The Laws of Australia*[13]:

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12 Vol 16, p 426,499.

13 Vol 27, p 13.

> "The circumstances in which a solicitor owes a duty in tort to third parties are diverse and uncertain. Ultimately the decision in each case must turn on its own facts and the application to them of the law relating to the elements of a duty of care, reasonable foreseeability of injury, damage or loss. In considering these matters, what used to be called a relationship between the parties is now referred to as a balancing of salient features. … The critical salient features are assumption of responsibility, direct contemplation that the third party was likely to be closely and directly affected by the conduct of the solicitor, lack of conflict with the primary duties owed to the client, vulnerability, knowledge of magnitude of the risk, control and proportionality. The terms of the retainer may determine the scope of the duty in tort as well as in contract." (footnotes omitted)

[81] The factual circumstances relied upon for the implication of a retainer were said by the plaintiff to be equally applicable in respect of the alleged existence of a duty of care. It was submitted that Mr Flehr raised the crucial matters concerning the special condition which could create a risk to the plaintiff; he told both parties about those matters, took instructions from them and made changes to the special clause on their instructions. It was thus said that Mr Flehr was providing advice, in circumstances where he knew that the plaintiff was relying on him in respect of that advice and that the plaintiff was at risk.

[82] It was submitted on behalf of the plaintiff that it was not sufficient to tell the plaintiff to "see another solicitor" and go no further. Given that Mr Flehr appreciated the risk which the plaintiff faced, it was argued that it was his duty to ensure that, at the very minimum, the plaintiff sought independent advice and, if she declined to do so, to receive an acknowledgement from her that she was aware of the risks, had the opportunity to obtain advice and elected not to do so. It was submitted that, if the plaintiff refused to seek independent legal advice, Mr Flehr should have advised the plaintiff not to execute the contract in circumstances where she was at such a risk.

[83] In making these submissions, counsel on behalf of the plaintiff relied heavily on *Irvine v Shaw*,[14] where solicitors permitted a non-client to execute a guarantee. In that case it was said:

> "There was in the circumstances a sufficiently proximate relationship to warrant the imposition of a duty of care, which I believe Mr Reece himself recognised in a general way, and no policy or other considerations operate to negate it. I am satisfied that Mr Shaw placed reliance on the solicitors when executing the assignment, and that was or must have been apparent to Ms Harre and at least inferentially accepted by her. That duty in my judgment required the solicitors:
>
> (a) expressly to recommend to Mr Shaw that he take independent legal advice;
> (b) in the event of the recommendation not being accepted, to advise him against executing the guarantee or at least to seek

[14] [1992] ANZ Conv Rep 83; see also *Pergrum v Fatharly* (1996) 14 WAR 92 at 102

> a limitation to its operation similar to that which applied to the existing director/guarantor.
>
> The situation was such that Mr Shaw obviously should have been expressly alerted to the need for separate legal advice as to the obligation he was undertaking, which was to be personally responsible without present or future limitation for the lessee's obligations under the lease. He was not, and I find that no positive recommendation to seek advice as given him on this occasion. Mr Duncan's evidence was unchallenged that had he been instructed, advice not to sign the document in its present terms would have been tendered, and the inference I draw is that such advice would have been followed by Mr Shaw."

[84] On behalf of the plaintiff it was also contended that assuming the existence of a retainer and/or a duty of care, upon Mr Flehr becoming aware of the risk that the son was mortgaging the property, he was also under a duty to advise the plaintiff to protect her interest in the property. On behalf of the plaintiff it was submitted that the evidence indicated that the defendants were aware of this risk before Mr Stringer had mortgaged the property.

The defendant's submissions

[85] The defendants submitted that the general rule was that no duty was owed by a solicitor to a non client, although accepting that in some limited circumstances such a duty may arise, including, for example, where a solicitor assumes responsibility towards a non client and the non client reasonably relies on the solicitors to do so.[15] However, counsel for the defendants referred to Thomas J's words of caution in *Hardware Services Pty Ltd v Primac Association Ltd*[16] :

> "In the absence of any suggestion of retainer, the plaintiff's claim is based upon tort alone. In order to succeed it must show that the solicitors in the circumstances owed him a duty of care. … This normally requires evidence from which it can be inferred that the plaintiff relied on the defendant taking care in circumstances where the defendant is or ought to be aware of that reliance. … Generally speaking it would be surprising if one who is not prepared to retain the solicitor and pay for his services could expect the solicitor to look after his interests. … In *Seale v Perry* [1982] VR 193, 199, Lush J. recognised that serious difficulties were involved in the concept that a solicitor may owe a duty of care to any person other than his client in the discharge of his client's instructions. The result would very likely be the creation of conflicting duties. The starting point seems to be that normally a person who has not engaged a solicitor has no right to expect that the solicitor will look after his interest and has no right to place reliance upon the solicitor taking any particular action in his interests."

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15 *Thors v Weekes* (1989) 92 ALR 131 at 150-151.

16 [1988] 1 Qd R 393 at 397.

[86] The defendants argued that in the absence of a finding that a retainer existed between the plaintiff and the defendants, there was no scope for a finding that the plaintiff reasonably relied on the defendants to protect her interests or that the defendants assumed responsibility to do so. Indeed, it was contended there is no basis for a finding that the plaintiff relied on the defendants at all. It was said that the plaintiff's evidence to the effect that she regarded Mr Flehr as her solicitor was ultimately based on her version of events that she informed him of that fact and was not contradicted by Mr Flehr and that, once that was rejected, there was no scope for the finding of the pleaded duty of care. Further, it was contended that the repeated recommendations that the plaintiff obtain independent legal advice made it clear that the defendants did not regard themselves as in a position to advise her. It was argued that the mere fact that Mr Flehr was alive to the plaintiff's vulnerability provided no basis for the imposition of a duty of care, in the absence of a corresponding assumption of responsibility. The imposition of such a duty, it was argued, would require a solicitor to advance the interests of the non client party over the interests of the client.

[87] In light of the considerations which demonstrated the absence of a retainer, it was contended that the plaintiff could not have expected the defendants to represent her and that the defendants did not undertake to do so. It was argued that to impose a duty on the defendants in those circumstances would create the very conflict which the plaintiff alleged the defendants were duty bound to avoid.

[88] As to the plaintiff's submissions that a duty of care arose from the meeting of 20 July 1992 and the fact that Mr Flehr had the plaintiff confirm the terms of the clause as acceptable and proceeded with the transaction on that day, the defendants argued that that was not the pleaded basis on which a duty of care was said to have arisen and that in any event the submission was untenable. It was contended that no duty to advise arose from the fact that the plaintiff was asked to and did confirm the acceptability of the clause. Nor, it was submitted, could it be said that by pointing out that there were aspects of the contract on which the plaintiff should seek independent legal advice, that Mr Flehr assumed a duty to advise on those matters.

[89] The defendants submitted that, merely confirming with the other party to a transaction that no changes were required to a contract and that it should be executed, in circumstances where the solicitor has recommended that the non-party seek independent advice and was told that the non-client had other solicitors acting, may be consistent with assuming an obligation to attend to mechanical tasks such as correctly drafting the contract and attending to its completion.[17] However, the defendants pointed out that that was not the duty alleged; the duty alleged was a duty to advise. The question was therefore whether the plaintiff reasonably relied on Mr Flehr to advise her with respect to the transaction, whether that was reasonably apparent to Mr Flehr and whether he assumed any obligation to do so. The evidence it was contended was inconsistent with each of those matters.

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[17] In this regard reference was made to *Thors v Weeks* (1989) 92 ALR 131 at 150-151 and *Beach Petroleum v Abbott Tout Russel Kennedy* [1999] NSWCA 408.

[90] Furthermore, it was argued that the plaintiff's submission that a duty was owed to ensure that the plaintiff received independent advice and to not proceed until she had or advise her not to execute the contract, was not part of the plaintiff's pleaded case and contrary to the evidence of the plaintiff's own expert, Mr Gregory.

Was there a duty of care?

[91] I accept the defendants' submissions that in every case the content of the alleged duty must be examined to determine whether it was reasonably apparent that the non-client reasonably relied on the solicitor to discharge it, whether that was reasonably apparent to the solicitor and whether the solicitor assumed responsibility with respect to it. Thus, in order for a duty of care to arise in the circumstances of this case, it would be necessary for the plaintiff to show that there was reasonable reliance on the defendants[18] and some express or implied assumption of responsibility by the defendants to the plaintiff.[19] In considering whether a duty of care arose and the nature of it, regard must be had to the limited nature of the alleged duty pleaded as opposed to the wider case put forward in submissions by the plaintiff. I accept the submissions of counsel for the defendants that on the facts of the present case no duty of care arose as alleged by the plaintiff.

[92] On the facts as I have found them, there was no assumption of responsibility by the defendants towards the plaintiff in respect of advising as to the terms and desirability of the contract. Nor was there any requisite reliance by the plaintiff in that regard. The plaintiff gave Mr Flehr to understand that she had obtained advice about the contract from other solicitors. The defendants were not required to obtain the name of those solicitors in order to check or verify the plaintiff's assertion (although it may have been a prudent course for the defendants to take for their own protection).

[93] There was no obligation on the defendants to do more than they did in advising that independent legal advice should be obtained in respect of the contract and in particular the issue of security. Given that the plaintiff led Mr Flehr to understand that she had obtained other advice concerning the contract, there was no further obligation on the defendants to cease to continue with the transaction and to advise the plaintiff of the dangers and risks to her in proceeding with the contract. In view of those circumstances, the issue (which did not form part of the plaintiff's pleaded case) as to whether Mr Flehr was under a duty not only to ensure that Mrs Stringer received independent advice, but also to advise her not to execute the contract if she refused to seek that advice, does not arise for consideration.

[94] For the sake of completeness, I add that had the plaintiff shown that there was a retainer or a duty of care that had been breached by the defendants, then her entitlement to damages would have been the $65,000 plus the sum of $26,760.75, being the total outlays in pursuing her son in respect of her interest in the property, together with interest. The defendants raised the issue that the plaintiff

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18 See *Ta Ho Ma Pty Ltd v Allen* (1999) 47 NSWLR 1.

19 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1995-1997) 188 CLR 241 at 252, 256, 261.

was required to proceed further than she did and to prove that her son was himself unable to repay any of the $65,000 to her. It was submitted by the defendants that that was a matter going to proof of the quantum of the plaintiff's loss rather than to mitigation. (The defendants' counsel indicated at the hearing of this matter that it was not alleged against the plaintiff that she had failed to mitigate her loss by failing to proceed against her son). The plaintiff's case was that she suffered loss because she was not advised to obtain and did not receive security over the property, such that when the property was sold, because of the mortgage debt, there was nothing remaining for her from the proceeds. In those circumstances, and bearing in mind the concession as to mitigation, I am satisfied that there was no obligation on the plaintiff in order to prove her loss to proceed further against her son than she did.

Orders

[95] In the circumstances, the plaintiff fails in her action against the defendants. I shall hear submissions as to costs.