SUPREME COURT OF QUEENSLAND

CITATION:	*Littler & Anor v Price & Ors* [2004] QCA 383
PARTIES:	**ALAN JOHN LITTLER** (plaintiff/respondent) **SUSAN ELIZABETH LITTLER** (plaintiff/respondent) **v** **LINDA JEAN PRICE** (first defendant) **C & L PRICE PTY LTD** ACN 060 624 008 **trading as LINDA PRICE BUSINESS, INSURANCE AND INVESTMENT SERVICES** (second defendant) **MARK GEORGE TEARE** (third defendant/appellant)
FILE NO/S:	Appeal No 6852 of 2004 DC No 4924 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	9 September 2004
JUDGES:	Jerrard JA, Cullinane and Holmes JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	CIVIL LAW — DAMAGES —NEGLIGENCE — DUTY OF CARE — DUTIES OF LEGAL PRACTITIONER — where appellant failed to advise clients about absence of guarantees in lease — whether legal practitioner under duty to advise of risks and absence of any protection against such risks — whether advice outside the duty of legal practitioners — where appellant failed to communicate with clients until execution of lease — where lessee company failed and lease payments ceased *Amadio Pty Ltd v Henderson & Ors* (1998) 81 FCR 149, applied *Attard v Samson* (1966) 110 Sol Jo 249, cited

Fox v Everingham & Howard (1983) 50 ALR 337, applied
Henderson & Ors v Amadio Pty Ltd (No 1) & Ors (1995) 62 FCR 1, applied
Orszulak v Hoy (1989) Aust Tort Rep 80-293, cited
Solicitors' Liability Committee v Gray & Winter (1997)147 ALR 154, cited
Spector v Ageda [1973] Ch 30, applied
Sykes v Midland Bank Executor and Trustee Co Ltd [1971] 1 QB 113, cited
Yates Property Corp Pty Ltd (in liq) v Boland (1998) Aust Tort Reports 81-490, cited

COUNSEL: D J S Jackson QC with R P S Jackson for the appellant
M M Stewart SC with A P J Collins and M Hovarth for the respondents

SOLICITORS: Brian Bartley and Associates for the appellant
Quinn & Scattini for the respondents

[1] **JERRARD JA:** In this appeal I have had the considerable advantage of reading the reasons for judgment and order proposed by Cullinane J, and I respectfully agree with those. I gratefully adopt His Honour's recital of the relevant facts, including the all important one that the long term lease executed by the plaintiff purchasers of the unit at the Coolum Beach unit complex imposed significant obligations to those plaintiffs upon that lessee company, which obligations were not secured by any guarantee from the Directors of that lessee company or any other security at all. I add the following remarks.

[2] These are that the appellant solicitor forwarded to the financier, for execution by Mr and Mrs Littler, almost all of the documents which are between AR 406 through to AR 458. Those include a loan agreement; the contract to purchase the unit; special conditions regarding refurbishment work to the complex; an agreement to grant a lease of the unit to The Coolum Beach Club Pty Ltd; provision for a guarantee and indemnity should the purchaser of the unit be a company or a trustee; provision for the appointment (by Barwicks Wisewoulds) of KPMG as signatory to an account to be established in relation to the refurbishment works; the lease itself and its terms which appear in a schedule; a power of attorney granted by the buyer to the seller, pursuant to clause 4.1 of the special conditions of the contract; and some additional special conditions. The solicitor's letter to the first and second defendant of 1 October 1998 was written on the assumption that those defendants had recommended the solicitor to Mr and Mrs Littler, and the prepared REIQ contract described him as their solicitor.

[3] The solicitor's pleadings admit that he agreed to act for reward as solicitor to Mr and Mrs Littler and to provide them legal advice with respect to the conveyance of the unit, admit that the contract contained an implied term that he would exercise reasonable care and skill in the performance of the retainer, and that he owed the plaintiff a duty to exercise reasonable skill and care in that performance. He charged Mr and Mrs Littler for perusing and advising them on the terms of the contract of sale, and on the lease agreement and all ancillary documents. He acknowledged in cross-examination that he was under a duty to raise the important terms of the contract with Mr and Mrs Littler, and that when he was drafting a lease

he would ask a landlord whether the landlord wanted guarantees of a tenant's performance.

[4] The solicitor did not charge Mr and Mrs Littler for preparation of those documents, but he forwarded them for execution when his evidence showed he had no basis for a belief that Mr and Mrs Littler would receive legal advice on the terms and effects of them from any other solicitor, and when nominating himself for that role. The documents were in respect of a significant investment, whatever the financial capacity or commercial experience of Mr and Mrs Littler, and the solicitor knew from his prior dealings with earlier purchasers that the lessee company was a three dollar one. That made the absence of a prepared draft guarantee by its directors of its performance as a lessee, or any other security for performance of those obligations, a significant omission from the matters to be transacted upon execution by all parties of the documents that were prepared.

[5] The solicitor had an obligation to draw to Mr and Mrs Littler's attention the absence of any such guarantee, and that was an obligation quite different in nature from the solicitor purporting to give them either financial or investment advice. Drawing the client's attention to the absence of a guarantee was a necessary part of any explanation of the terms of the proposed lease, which explanation would include that the lessee's obligations as to rent were expressly related to the contract price Mr and Mrs Littler were paying, were specific, would be owed for a minimum of 10 years, and were entirely unsecured.

[6] The solicitor knew all of those matters. The terms of his admitted retainer and his account, which show that he accepted a duty to provide legal advice, obliged him to put at the plaintiff's disposal not only his skill but also his knowledge (see *Spector v Ageda* [1973] Ch 30 at 48). He could not act for the plaintiff and withhold any relevant knowledge he had (*Spector*, citing *Moody v Cox* [1917] 2 Ch 71). The solicitor charged for performing a company search; he was obliged to tell Mr and Mrs Littler that the nominated lessee was a three dollar company.

[7] The terms of the admitted retainer appear indistinguishable from that described in *Henderson v Amadio* (No 1) (1995) 62 FCR 1 at 137 – 138 "to act in the conveyance of the property and the mortgage." The Full Federal Court held, and I respectfully agree, that the solicitor's obligations included those of perusing and advising on documents executed before the solicitor was retained, and to advise of any unusual benefits the documents conferred or any unusual burdens or detriments which it imposed. The retainer is also similar in terms to that found in *Fox v Everingham & Howard* (1983) 50 ALR 337 at 338, namely to "represent his wife and himself in the purchase of 'this house'". The Full Federal Court held, and again I agree, that that retainer included an obligation to explain the salient points of the contract to the purchasers, any provisions of it which were in an unusual form and which might affect their interests as they were known by the solicitors, and to give attention to the question of whether the contract contained adequate provisions from the point of view of the purchasers to protect them against a variety of contingencies which might have reasonably been foreseen as likely to arise "if things did not go as expected". The Court summarised the solicitor's obligations as being that the purchasers were entitled to rely on the solicitors to see to it that the contract was adequate to protect their interests.

[8] Forwarding the documents to the investment advisor, as he did, shows that the solicitor actually assumed Mr and Mrs Littler – whom he also assumed might accept his unqualified offer to be their solicitor in the contract, the lease, the refurbishment agreement, etc., – would execute those documents without legal advice from him. That assumption was contrary to his obligations to Mr and Mrs Littler, which included the obligation not to forward those executed documents to the buyer without explaining at least their important terms and their significant effect to his clients. He gave no satisfactory reason for his not having done that until after the buyer had executed the documents; his saying that he assumed the financial advisor had done that impermissibly delegated the solicitor's obligations to the advisor, and saying that the clients did not contact him to ask for advice failed to put at their disposal the knowledge he had. If his doing that risked jeopardising his chance of getting his fee agreed upon between himself and the financier and dependant upon the transaction going ahead, then that was a matter he was not entitled to take into account.

[9] **CULLINANE J:** The appellant appeals against the judgment of the District Court pronounced in favour of the respondents on 22 July 2004 in the sum of $107,939.00 with costs to be assessed.

[10] The appellant was the respondents' solicitor in relation to the purchase by them of a unit at the Coolum Beach Unit Complex (previously the Surfair Hotel) on the Sunshine Coast.

[11] The learned trial judge found that the appellant had breached the duty owed by him to the respondents as their solicitor as a result of which they suffered loss.

[12] In this appeal the appellant challenges that finding. There is a challenge to the finding as to when the appellant was retained by the respondents, the nature of the duty which the appellant owed to the respondents as a result of such a retainer and also to damages.

[13] By his pleading the appellant acknowledged the existence of a duty of care and acknowledged that this included a duty to advise. The challenge is to the finding that the appellant was in breach of that duty by not advising the respondents about certain matters which will be referred to hereunder.

[14] There was little in dispute factually between the parties. The respondents had approached a financial adviser (Linda Jean Price, the first defendant in the proceedings who is not a party to the appeal) in 1998 seeking advice about investments which the respondents had in mind to provide for their retirement. They were at this time in their mid to late forties.

[15] In discussions with Price the Coolum Beach Unit complex was discussed as one of the possibilities and was identified as the most suitable. They were given a brochure which contained projections based upon an 8.5 per cent per annum return from rental payable by a company which would rent the units and conduct a resort in the complex. They were told by Price that there was a guaranteed rental of 8.5 per cent with increases each year. The proposed term of the lease was 10 years with options of two further periods of 10 years.

[16] The appellant had previously carried out work for investors in the complex who had been referred to him by Price. He and Price had discussed the referral of clients to

him and he had quoted a fee of $900.00. This is the amount in which he rendered fees to the respondents. A number of clients had been referred to him prior to the respondents. Price recommended the appellant to the respondents as someone who had acted for other purchasers suggesting that it would in consequence be advantageous to the respondents to engage him. The respondents accepted this suggestion.

[17] The respondents decided to proceed with the contract and on 1 October 1998 saw Price at her office in Maroochydore. Price had with her contracts which had been completed by the appellant including details of personal particulars of the respondents. It showed the appellant as the respondents' solicitor. The respondents on that day signed two copies of the contract.

[18] The contract appears at page 414 of the record. As will be seen it is in standard REIQ form but contains various annexures and special conditions and can be described as extensive. The appellant also prepared other documentation.

[19] On 6 October 1998 the appellant received the contract signed by the respondents. He immediately sent them to the solicitors for the vendor where they were signed on the following day and he was notified that this had occurred. He received the signed contracts some days later.

[20] Prior to this time the appellant had neither seen nor spoken to the respondents. He had their personal details including their address but had made no attempt to contact them and they had not sought to contact him. He did not have any personal contact with them until 16 October 1998.

[21] He arranged to meet them at their home on the evening of Friday 16 October for the purposes of executing the lease documents. The documents were signed. The appellant invited the respondents to read the documents over the weekend and contact him with any concerns. He informed the respondents that the contract would be completed on 20 October, that is, somewhat earlier than contemplated by the contract. Completion took place on that day.

[22] The appellant had written a letter to Price dated 1 October 1998. This appears in paragraph [11] of the reasons for judgment of the learned trial judge. It refers to the delivery to Price's office of a contract for sale for execution by the respondents and a disclosure document and asks for the return of the documents following execution. The appellant was aware that the respondents were borrowing monies to complete the purchase.

[23] The learned trial judge inferred that as at 1 October 1998 when the letter was written the appellant had been retained to act on behalf of the respondents in the transaction as a result of an approach to act on their behalf following discussions which Price had had with the respondents about a solicitor and the preparation of the documents then submitted by the appellant to Price for the purposes of having the respondents sign them. As I have said the draft contract showed the appellant as the respondents' solicitor.

[24] There was no dispute that the appellant was in fact retained by the respondents but it is the appellant's case that this occurred only as and from 6 October 1998 when he received a copy of the contract signed by the respondents.

[25] The appellant challenges the finding that a retainer arose as early as 1 October 1998 and contends that it is a matter of significance that it did not occur until 6 October 1998. It is the appellant's case that in preparing the contracts and submitting them to Price he was in effect offering to act on behalf of the respondents if they decided to proceed but says that it was not until they signed the contract and it was returned to him that a retainer arose. His Honour did not think that it was material whether the retainer was entered into on 1 October or on 6 October.

[26] On 16 October 1998 after the contract had been executed by all parties the appellant wrote to the respondents in terms which took the form of a brief summary of the effect of various provisions of the contract and lease. His Honour found that this did not adequately discharge the duty which the appellant owed to the respondents and failed to address certain matters to which I will shortly refer.

[27] The finding made by the learned trial judge against the appellant appears to be a finding in negligence but it was not contended that anything turned upon this it being accepted that the duty in negligence was co-extensive with the duty in contract in this case.

[28] His Honour accepted evidence from a Mr Gregory a solicitor who gave evidence of what in his opinion the appellant ought to have done in accordance with the general practice of solicitors acting in such matters.

[29] His Honour found (paragraph [28] of the reasons for judgment) that there were a number of particular features associated with the contract which the appellant in accordance with the duty he owed to the respondents as their solicitor was obliged to draw to the attention of the respondents and give advice to them about their position and any risks associated with these matters and what might be done to protect their interests. It is apparent that the most significant aspect of the transaction in this regard was the absence of any protection of the income to be received by the respondents pursuant to the lease in the event that the lessee company was unable to meet its obligations and the need if possible to secure their position by guarantees.

[30] It would have been obvious that receipt of income by way of the rental of the unit was a matter of central importance to the respondents as purchasers and lessors.

[31] The appellant was aware, it was accepted, that the lessee company was a $3.00 company. It appears that the learned trial judge may have misunderstood the effect of the evidence, finding that the appellant knew this because he had carried out a search on 1 October. This is not the case but it is accepted that the appellant was aware of this fact from earlier dealings in relation to the lessee company.

[32] His Honour held that the respondents had acted in reliance upon the appellant in proceeding to complete the contract and he accepted evidence which had been given by them to the effect that had these matters been drawn to their attention they would not have completed the contract.

[33] The primary challenge of the appellant is to the finding that the duty of the appellant included an obligation to draw the attention of the respondents to the matters I have just referred to and in particular to give them advice relating to the lease and the absence of any protection of their position in the absence of guarantees.

[34] The appellant contended that he was under no obligation to give any advice to the respondents about any of the matters which his Honour identified in paragraph [28]. Any obligation to advise was, on the appellant's case, limited to the matters which the appellant canvassed in his letter of 16 October. The appellant would, so the argument ran, have been obliged to give advice to the respondents about the matters upon which adverse findings were made including the lease and the payments thereafter only if such advice was sought or information was furnished to him which would have suggested the need for such advice.

[35] It was also contended that advice of the kind which his Honour found ought to have been given was of a financial or commercial nature and was thus outside the duty of a solicitor. See *Orszulak v Hoy* (1989) Aust Tort Rep 80-293.

[36] The learned trial judge had accepted evidence given by the respondents that they had assumed that the appellant had checked the contract on their behalf when Price showed them the contract on 1 October 1998 with their personal details filled in in handwriting and in which the appellant was named as their solicitor.

[37] In my view the conclusion which the learned trial judge reached that the duty of the appellant extended at the least to advise them about the lease and the lack of protection of the respondents in the absence of guarantees of the lessee company's obligations was justified. It is not necessary to consider whether the appellant's duty extended to all of the matters referred to in paragraph [28] of the learned trial judge's reasons for judgment.

[38] It seems to me that clear and unambiguous support for the finding that the appellant owed a duty to the respondents in relation to the matters to which I have referred is to be found in cases such as *Fox v Everingham & Howard*[1], *Henderson & Ors v Amadio Pty Ltd & Ors*[2] and (on appeal) *Amadio Pty Ltd v Henderson & Ors*[3].

[39] In *Fox v Everingham* the appellant approached a solicitor who was also acting on behalf of the vendor at a time when they were desirous of purchasing land upon which the vendor would construct a house.

[40] The purchaser approached the solicitor and enquired whether he would represent them in the purchase of the house.

[41] The Full Court of the Federal Court said at page 341:

> "The retainer given by the Foxes to the respondents obliged the respondents to act generally in the Foxes' interests in and about their entering into the contract and their taking of title to the property pursuant thereto. At the least that obligation required the respondents, either themselves or by an employee qualified to do so, to go through the contract with the Foxes and explain the salient points of it to them. In this way their principal rights and obligations under it would be explained as would the general course the matter might be expected to take. The respondents were also under an obligation to explain to the Foxes provisions of the contract which were in an unusual form and which might affect their interests as

[1] (1983) 50 ALR 337.
[2] (1995) 62 FCR 1
[3] (1998) 81 FCR 149 (on appeal).

> they were known by the respondents to be. In this respect we refer to *Sykes* v *Midland Bank Executor and Trustee Co Ltd* [1971] 1 QB 113, where the court found a solicitor negligent because he had failed to draw his client's attention to a clause in an underlease which prohibited the use of the premises for other than specified purposes without the consent of the lessor. We refer also to *Attard* v *Samson* (1966) 110 Sol Jo 249.
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> The respondents were also under an obligation which required them to give attention, before the contract was signed by the Foxes, to the question of whether it, from their point of view, contained adequate provisions to protect them against a variety of contingencies which might reasonably have been foreseen as likely to arise if things did not go as expected. It does not appear whether the contract was drafted in the respondents' office, but it was proffered by them on behalf of the company. The Foxes were entitled to rely on the respondents to see to it that the contract was adequate to protect their interests.
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> In cases such as the present a solicitor is paid not only for what he in fact does, but also for the responsibility he assumes in trying to protect clients from financial loss if things go wrong. It is easy enough to act for people if things go as they are expected to. But it is because the unexpected will sometimes happen that solicitors are rightly paid the fees which they command. The corollary of this proposition is that if they do not measure up to the standard which is required of them, they are liable for breach of the obligation which they owe to clients. The standard required of them is not an absolute one."

[42] In *Amadio*'s case the solicitor was engaged by a firm of solicitors having a power of attorney on behalf of the purchasers to act in the conveyance of certain property and in relation to a mortgage.

[43] At first instance Heerey J applying the principles expressed in *Fox v Everingham* said at pages 139 and 140:

> "I find that Nevett Ford's retainer imposed an obligation on them to advise their clients as to the nature of the rights and obligations they were undertaking by becoming parties to the contract of sale, transfer and mortgage or guarantee. The retainer was not limited to the task of ensuring that the purchasers obtained a good marketable title to the property.
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> Once it is accepted that a solicitor is acting for a lay client in relation to a transaction involving, after the retainer commences, the execution of technical legal documents, it must follow in my opinion that the solicitor is obliged to explain and advise the client as to the effect of those documents. (I am speaking of lay clients in the sense of people whose ordinary business does not include transactions of the kind in question; different considerations might well apply, for example, to a client like Hudson Conway.) Much modern legal documentation, such as mortgages and commercial leases, is virtually unintelligible even to well-educated lay people. Yet generally speaking the law binds people to documents they sign, whether read or not. It is for this very reason that a solicitor's

> explanation and advice is so essential. And often it is important for a client to know what a document does *not* contain."

[44] The Full Court of the Federal Court on appeal agreed with Heerey J that such a duty arose (See p 210).

[45] The appellant in the present case sought to distinguish those cases upon the grounds that the respondents did not approach the appellant prior to having signed the contract. The argument was advanced that the respondents must be taken to have satisfied themselves about the terms of the contract and there was no obligation to advise them of features of the contract such as the lease and the risk which the respondents were exposed to in the absence of guarantees unless it was specifically sought or unless information was provided to the solicitor which would have enabled him to identify the need to give such advice.

[46] In *Amadio's* case, a lease of the premises which was central to the dispute which arose had already been executed when the solicitor was retained. The solicitor on appeal relied upon the passage in the judgment of Heerey J at first instance set out in para 36 of the reasons where he referred to the execution of technical legal documents "after the retainer commences", arguing that the duty of a solicitor to advise was limited to such documents.

[47] The Full Court of the Federal Court dealt with the matter at p 215.

> "However, his Honour is not to be understood as holding in that passage that a solicitor's obligation to explain, and advise the client as to, the effect of legal documents arises only in respect of those documents which are to be executed after the solicitor has been retained. In the present case, as we have already pointed out, the draft contract of sale forwarded to Nevett Ford expressly recited that the property was subject to a lease and required the purchasers to acknowledge that they had inspected the lease and were satisfied with the terms and conditions in respect of it. In those circumstances, we consider that it was part of Nevett Ford's retainer to peruse the lease and advise their principals, either directly or through Gray & Winter or their accountants, of any unusual benefits which it conferred on the tenant or any unusual burdens or detriments which it imposed on the purchasers as landlords. In this respect, the obligation on Nevett Ford is not dissimilar from that undertaken by a solicitor for a purchaser to advise about the effect of a restrictive covenant notwithstanding that the contract pursuant to which it has been created long antedated the solicitor's retainer. We consider that the proposition enunciated by Harman LJ in *Sykes v Midland Bank Executor and Trustee Co Ltd* [1971] 1 QB 113 at 124 that:
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> > 'When a solicitor is asked to advise on a leasehold title it is, in my judgment, his duty to call his client's attention to clauses in an unusual form which may affect the interests of his client as he knows them':
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> applies no less when an existing lease is incorporated by reference in a proposed contract of sale than when a new lease is to be entered into by the client."

[48] These remarks are in my view equally applicable in the present case. Furthermore as will be obvious when the respondents retained the appellant (whether on 1 October or 6 October) they were not bound by the contract which had not been executed by the vendor.

[49] As to the argument that the learned trial judge's findings would impose an obligation on a solicitor to give commercial or financial advice I think it is plain that this is not the case. It is the legal effect upon the respondents' interests that the absence of such protection has that impacted upon their financial interests. A similar argument was advanced in Amadio's case. The Full Court of the Federal Court dealt with it at page 214 in terms which are applicable here also:

> "In the present case, the failure imputed to Nevett Ford was to advise of the possibility that the rent payable under the lease could fall instead of rise. That, it was argued, was a failure to give commercial or economic advice which, on the principles explained on *Orszulak* v *Hoy*, was not part of the retainer of a solicitor engaged to act in the conveyance. However, in our view, his Honour drew a clear distinction between the duty to advise on the legal effect of provisions in the lease and advice about the commercial or economic consequences of that legal effect when he said (at 141-142):
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> > "The lease was fundamental to the commercial viability of the investment and the rental income to be derived from it had obviously been a major feature in the selling of the investment, particularly by use of the cashflow. The contract of sale contained the following special condition:
> >
> > 'Property sold subject to a Lease
> >
> > 7.(a)The Purchaser acknowledges that prior to entering into this Contract it has inspected the lease and the Purchaser agrees that it shall be deemed to be aware of and satisfied with the terms and conditions in respect of the lease and further acknowledges that the details of the lease are correct as at the date hereof.'
> >
> > It is true that the lease was in existence at the time of the purchase and that substantial variations against the tenant's interest were unlikely to be achieved. But by the same token the clients were not legally bound to the purchase until the exchange of contracts at settlement on 29 June. Proper advice to the clients as to the terms of the lease was needed because a proper understanding of the benefits or otherwise of the lease was essential to the making of an informed decision whether to invest at all."
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> We do not consider that his Honour imputed to Nevett Ford a failure to advise on the likelihood or degree or risk in the prevailing economic climate that the rent might be adjusted downwards. Rather, he imposed on them a duty to advise the purchasers that the lease, as a matter of law, exposed them to that risk to which they would not have been exposed had the lease contained a "ratchet" or "no reduction" clause. Had Nevett Ford discharged that duty, the investors, as his Honour implied, would have been alerted to the need to make the commercial or economic "decision whether to invest at all."

> In any event, any commercial aspects of advice as to the absence of a ratchet clause are inextricably interwoven with the professional aspects of the advice. As a result advice on that issue, given by a solicitor wearing a solicitor's hat is still professional legal advice notwithstanding that it has commercial aspects to it: see *Solicitors' Liability Committee* v *Gray* at 49-50; 196-197."

[50] The learned trial judge correctly rejected the argument that the advice which ought to have been given was of a financial or commercial nature.

[51] Finally it should be said that the argument that the duty to advise would arise only in the event that that advice was specifically sought or information provided which would thus suggest the need to give such advice was also correctly rejected by the learned trial judge. The duty to advise cannot be avoided in this way. Such an approach would invert the whole basis for imposing a duty of this kind. As was said by the Full Court of the Federal Court (in a passage which appears in the learned trial judge's reasons), in *Yates Property Corporation Pty Ltd (in liq) v Boland* (1998) Aust Tort Reports 81-490. When dealing with a similar argument:

> "Secondly, the submission completely loses sight of the fact that a solicitor is retained by a client because a solicitor is a professional person who by his training and qualifications is able to provide advice to his client on matters of law: when a solicitor is retained to conduct litigation his function is to further his client's interests in that litigation. That is what he is qualified to do and that is why he is paid a fee."

[52] I think that his Honour's finding that the evidence justified the inference that a retainer came into existence as at 1 October was open on the evidence but it does not seem to me material whether this is so or whether it came into existence on 6 October as the appellant contends.

[53] It follows that the grounds of appeal insofar as they challenge the learned trial judge's findings on the primary issue must be rejected.

[54] So far as the appeal on the issue of damages is concerned this involves an attack on findings of fact. In particular it challenges the preference by the learned trial judge for the evidence of the valuer called by the respondents (Smith) to the evidence of the valuer called by the appellant (Cox).

[55] The lessee ceased paying rental in May 2000 and in June 2000 an administrator was appointed. The respondents were faced with the need to sell the property. A number of contracts were entered into but in each case the contract was subject to finance and in each case the contract failed to complete.

[56] At the beginning of 2003 the unit had been listed for sale at $62,000.00 (not $72,000.00 as appears in paragraph [47] of the reasons) but no offer was received.

[57] Ultimately the unit was sold in July 2003 for $50,000.00. It is that component of the damages relating to the loss associated with the resale at such a price that is the subject of challenge.

[58] It is important to bear in mind that the real issue was not the market value of the unit at the time it was sold as such but rather whether the respondents acted reasonably

in attempting to mitigate their loss. The onus of proof in this regards rested upon the appellant.

[59] To the above issue the question of the market value at the relevant time and the steps taken by the respondents to realise it were of obvious importance.

[60] The position of Smith was that it was impossible to establish a market value given the wide range of prices realised upon the sale of units in the complex which came on the market following the failure of the lessee company. He approached the matter upon the basis that the initial purchasers had acquired units at a value far in excess of the market value because of promised rentals which were themselves far in excess of any returns that could be justified by reference to the market. His view was that purchasers acquired an income stream.

[61] He assessed the value of the unit at the time of resale on the same basis by adopting a rate of 13.5 per cent for capitalisation purposes. By this approach he arrived at a figure just slightly above the amount realised.

[62] He referred to a number of resales of units ranging from $25,000.00 to $54,000.00 which he suggested were illustrative of what he described as the "dilution of value" reflected in the resales of units following the collapse of the lessee company. He said that whilst he did not apply these sales as his primary approach he regarded them as providing support for the figure he had reached by the capitalisation of income method.

[63] Cox on the other hand sought to apply some of the sales of units to establish the market value. He identified five sales at about the relevant time and applying these concluded that the subject unit had a value of $85,000.00.

[64] He said that he excluded other sales which reflected lower values and higher values because they appeared to be out of line. The range of the sale prices achieved on resale appear at page 905 of the record. There was evidence of widely differing amounts achieved upon resales of the same unit.

[65] It is plain that his Honour did not regard the evidence of either valuer as particularly satisfactory but ultimately preferred the evidence of Smith.

[66] The respondents were at the time in the position where they were facing an expenditure of $3,000.00 for refurbishment if they retained the unit. There were advantages to them in the sale of the unit prior to the end of the financial year to offset capital gains achieved by them upon the sale of another property which they owned.

[67] His Honour gave reasons for rejecting the evidence of Cox which in my view are rational and acceptable. He was entitled to, as he did, take the view that the market value was not established by the selection of some sales and the rejection of other sales without a full understanding of why such differing sales prices were obtained. His Honour was also entitled to take the view, as he did, that the history of attempts to sell the respondents' unit was not consistent with the value Cox contended for.

[68] Ultimately the appellant here faces the difficulty of challenging findings of fact namely his Honour's finding that the resale value by the respondents of $50,000.00 was a sale at a proper value and that the respondents had not acted unreasonably in

mitigating their loss in effecting the resale at that value. Those findings were, in my view, open on the evidence.

[69] The challenge to the learned trial judge's finding on damages also must fail.

[70] The appeal should be dismissed with costs to be assessed.

[71] **HOLMES J:** I agree with the reasons of Cullinane J and with the order he proposes.