

Be clear as to grounds to terminate a retainer

In *The Trust Company (PTAL) Pty Ltd v Romeo (No. 4)*,¹ Schmidt J had to consider a solicitor's application for leave to file a notice of ceasing to act and to withdraw from the proceedings.

The cost agreement entitled the solicitor to file a notice of ceasing to act if the client either:

- unreasonably refused to act in accordance with the solicitor's advice; or
- an amount in excess of \$1000 in respect of any account is outstanding for more than 30 days; or
- the client didn't within 7 days, comply with a request to pay a disbursement or a prepayment.

The solicitor at the time of making the application was owed in excess of \$100,000 in legal costs and disbursements in the proceedings.

In accordance with the cost agreement, the solicitor filed and served a notice of intention to file a notice of ceasing to act on number of occasions.

After these notices were served the solicitor and client agreed that he would continue to act for the client provided that the sum of \$105,000 (\$80,000 for counsel and \$25,000 for the firm to conduct the hearing of the proceedings) be deposited into the firm's trust account by a specified date. These funds were not received. Despite further negotiations for provision of funds for the conduct of the proceedings, the client failed to pay and this led to the services of the various notices.

The solicitor finally, on a specified date, gave certain advice to the client which the client refused to act on; at the same time the client had still not honoured prior representations that the solicitor would be put in funds. The solicitor served a final notice of ceasing to act and sent both a letter and email to the client to explain why he proposed to cease to act.

The client opposed the application. He contended that he should not be left unrepresented when he had been paying the solicitor \$3000 a week, money which ought not to have been taken if the solicitor intended to withdraw. The solicitor's position is that these amounts were paid to pay off what was owing in respect of other matters in which he acted for the client.

Justice Schmidt noted "that a client's failure to provide money for costs and disbursements can be an appropriate basis upon which the leave which is sought may be granted."²

In *Super 1000 Pty Ltd v Pacific General Services Ltd*³ Gzell J held that:

"... a failure by a client to provide funds to cover disbursements is good cause for termination of a retainer (*Wadsworth v Marshall* (1832) 2 Cr&J 665 (149 ER 2 79), *Robins v Goldingham* (1872) LR 13 Eq 440, *Warmington v McMurray* [1937] 2 All ER 562...)"

In *Wadsworth v Marshall*,⁴ Bayley B said:

"[a solicitor]⁵ has a right to call upon the client from time to time, on reasonable notice to make advances, and, for the purposes of taking the cause to trial, to supply him with adequate funding [to pay] the expense out of pocket".

¹ [2013] NSWSC 1447.

² At [8].

³ [2007] NSWSC 171.

⁴ (1832) 2 Cr&J 665 (149 ER 279).

⁵ Words inserted.

In *Super 1000 Pty Ltd*⁶ Gzell J also noted that Ritchie's Uniform Civil Procedure New South Wales stated that "where a solicitor is prevented by the client from properly carrying out the duties required by the retainer good cause for termination is established (*Underwood, Son & Piper v Lewis* (1894) 2 QB 306 at 314) (*Underwood*). In *Underwood*⁷ A. L. Smith L. J. said:

"... it is clear that the solicitor may be placed in such a position by the client as to absolve him from further performance... the client may put the solicitor in such a position as to entitle him to decline to proceed; for instance, if the solicitor asks for necessary funds for disbursements, and such funds are refused by the client, the solicitor is not bound to go on... the solicitor is not bound to go on acting for the client if the client insists on some step being taken which the solicitor knows to be dishonourable.... [or] when a solicitor is in a position to show that the client has hindered and prevented him from continuing to act as a solicitor should act, then upon notice he should decline to act further..."

Schmidt J held that the solicitor was justified in ceasing to act. The evidence established ongoing attempts to secure necessary funds and that he was not dilatory.

Matters to consider:

1. Review cost agreements to expressly provide for a right to terminate where:
 - The client hasn't, within a specified time, failed to comply with a request to pay a disbursement or provide adequate advances for disbursements and out of pocket expenses;
 - Where a client insists on some step being taken which in the solicitor's opinion is dishonourable; and
 - Where the client hinders and prevents the solicitor from continuing to act as he or she should act or unreasonably refuses to act in accordance with your advice.
2. Do not be dilatory in your pursuit of the client putting you in funds to cover future costs and disbursements;
3. Act promptly on breaches and give clear notice (remember, a reasonable time is required to be given);⁸
4. Do not delay in seeking to extract the necessary funds as dilatory behaviour may lead the court to conclude that reasonable notice has not been given.

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⁶ *Super 1000 Pty Ltd* at [14].

⁷ *Underwood* at p 314.

⁸ Rule 13.1.3 *Australian Solicitors Conduct Rule 2012*.