DISTRICT COURT OF QUEENSLAND

CITATION:	*PSAL Limited v Galilee Solicitors* [2016] QDC 162
PARTIES:	**PSAL LIMITED** (plaintiff) **v** **GALILEE SOLICITORS** (defendant)
FILE NO:	233/2013
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	30 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2015; 10 November 2015; 11 November 2015; 3 February 2016
JUDGE:	Dick SC DCJ
ORDER:	**1. Judgment for the defendant.** **2. Plaintiff to pay the costs of and incidental to the trial, to be assessed on the standard District Court scale.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – NEGLIGENCE – where fund were borrowed — where the loan was to be secured by a mortgage over property – where the mortgage was not registered due to fraud – where the loan fell into default – whether the plaintiff was the client of the defendant in respect of the loan transaction - whether the defendant was negligent and in breach of its retainer in respect to its advice to the plaintiff and the manner in which it carried out its duties – whether the plaintiff suffered loss as a consequence of the defendant's breach *Artahs Pty Ltd v Gall Standfield & Smith (a firm)* [2013] Qd R 202 applied *Australian Energy Ltd v Lennard Oil* [1986] 2 Qd R 216 cited *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279 applied

Gould v Vaggelas (1985) 157 CLR 215 applied

Holdway v Arcuri Lawyers [2009] 2 Qd R 18; [2008] QCA 218 cited

Integrated Computer Services Pty Ltd v Digital Equipment Corporation Australia Pty Ltd (1988) 5 BPR 11, 110 cited

Pegrum v Fatharly (1996) 14 WAR 92 cited

Vella v Permanent Mortgages Pty Ltd [2008] NSWSC 505 cited

COUNSEL: M D Alexander for the plaintiff;

P O'Higgins for the defendant

SOLICITORS: Piper Alderman for the plaintiff;

Bartley Cohen for the defendant

Background

[1] The plaintiff was a company which was involved in short term money loans and acted as a mortgage manager on occasions. In December 2009 the plaintiff was approached by a broker acting on behalf of Emily Thatcher ("Thatcher"), Jason Gilberthorpe ("Gilberthorpe") and Smart Art Direct ("Smart Art") for a loan. By the end of December 2009 there was in existence a loan agreement in the amount of $183,000.00. The loan agreement specified the loan was from Owl Projects Pty Ltd ("Owl") to the three borrowers. The loan was to be secured by a mortgage over Thatcher's property in New South Wales.

[2] As it transpired, the funds were advanced but the mortgage was not registered due to the fraud of Gilberthorpe and the loan fell into default. Owl sued Smart Art and Gilberthorpe in the New South Wales District Court seeking recovery of the loan and obtained default judgment against each of them. The New South Wales statement of claim:

(a) alleged that Owl was the lender pursuant to the loan agreement;

(b) alleged that Owl advanced the funds to the borrowers;

(c) alleged that the borrowers breached certain terms of the loan agreement;

(d) pleaded the letter of demand sent by Owl's solicitors (the defendant) to the borrowers; and

(e) sought to recover the debt, default interest and default management fees.

The claim

[3] The plaintiff alleges:

(a) the plaintiff (PSAL Limited) borrowed the funds for the loan from Owl and then lent the funds to the borrower;

(b) PSAL was the client of the defendant in respect of other transactions;

(c) PSAL was the client of the defendant in respect of this loan;

(d) the defendant was negligent and in breach of its retainer in the manner in which it provided the advice (or relevantly failed to do so) and carried out its duties; and

(e) the plaintiff suffered a loss as a consequence in that it was obliged to repay Owl the amount of the loan.

[4] The plaintiff's claim depends upon a proof of a retainer in respect of the loan, that is, proof of a solicitor-client relationship between the plaintiff and the defendant in respect of the loan transaction in question, as well as proof of breach of duty by the defendant and proof of loss suffered by the plaintiff as a consequence of the defendant's breach.

Evidence

Mr Jamie Dormer

[5] At the relevant time, Mr Jamie Dormer was a director of the plaintiff. He gave evidence that the plaintiff not only funded loans from its personal funds but also from debt funders to lend to borrowers.[1] He said the prime market was the short term second mortgage market although, on occasions, it was a first mortgage.[2] The average loan was for about three months and was about $300,000.[3] He said the plaintiff employed the defendant regularly but not exclusively as its solicitor in such transactions and it did so because the defendant could perform its duties quickly and that was required for the plaintiff's business.[4] He gave evidence that in these transactions the plaintiff was usually the lender but, on occasions, acted as a mortgage manager. He rejected the proposition that when, as here, the approach for the loan came from a broker, the plaintiff usually acted as a mortgage manager rather than lender.[5]

[6] Mr Dormer said that the plaintiff was not the "intermediator" but the funds transferred to the borrowers was the plaintiff's money which it had borrowed from Owl. He said there was an understanding (not always adhered to) with the defendant that the plaintiff was always a co-lender and would be noted on the loan documents as a lender.[6]

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1 T1-27 lines 5-20.
2 T1-29 line 20.
3 T1-29 lines 22-27.
4 T1-30 lines 5-10.
5 T1-49 line 20.
6 T1-31 line 15.

[7] On 23 December 2009 Mr Peter Flanders, of the plaintiff, sent an email to Mr Bradley Booth, of the defendant, attaching a document entitled "(Form 201 – Solicitors Instructions)."

[8] That document said as follows:

> *Dear Brad,*
>
> *Could you please prepare the following loan documents in accordance with the details below;*
>
> ***Lenders details:***
>
> *Entity: Owl Projects Pty Ltd ACN: 110 415 015,*
>
> *c/o Drake & Associates*
>
> *Level 1, 260 Waterworks Road Ashgrove Queensland 4060*
>
> *Solicitors: Galilee Solicitors*
>
> *Level 9, 144 Edward Street Brisbane Queensland 4000*

[9] The rest of the document set out the loan details, the borrowers' details, the borrowers' solicitors' details and the property security offered.

[10] In a paragraph entitled "deductions at settlement" the following appeared:

> ***PAYEE DETAILS***
>
> *1. PSAL Limited* *Mortgage Management Fees: $600.00*
>
> *Research and Diligence fees: $750.00*

[11] The letter concluded:

> *Please proceed with the above instructions, if there is any information missing or required to be clarified please contact myself on the numbers listed above or on my mobile.*
>
> *I further request that these documents be prepared with time being of the essence, as the client needs to settle ASAP.*

[12] Mr Dormer also agreed that in the event of a default on the part of the borrower the plaintiff's role would include being involved in the recovery of the loan.[7]

[13] He said that he had not seen the loan documents prior to settlement because the documents were "housed with Galilee". He said "we never saw them unless it went to litigation".[8] However, there is in evidence an email from Patrick Schmidt of the

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7 T1-52 line 5.
8 T1-75 lines 20-22.

defendant to Mr Flanders of the plaintiff on 23 December 2009 attaching the loan documents.[9]

[14] He agreed that when the default occurred he emailed the defendant instructing that the District Court documents were to be prepared in the name of Owl as the lender. He explained he did so because Ms Austin from the defendant firm had advised that the recovery would have to be in that name because Owl was the name of the lender on the loan documents. [10] He said he had complained to Ms Austin that the standing arrangement to include the plaintiff on the loan documents was not done. There is nothing in writing to support that allegation. Mr Dormer says that this complaint was made on the telephone.[11] It is worth noting that it was not mentioned in the many emails about the matter.

[15] Mr Dormer said that prior to settlement, probably the day before, he and Peter Flanders were travelling by car to New South Wales when Mr Schmidt from Galilee Solicitors rang. The telephone was on speaker and he and Mr Flanders heard the call.[12] He said that Mr Schmidt advised:

> *…that the certificate of title was not being produced by – by the borrowers currently and we said well why not, because it was an unencumbered block of land or, actually, a house, so there was not first mortgage or anything on it. Patrick said that apparently Gilberthorpe needed, I think, a week or two weeks to be able to produce it or get a – get it redone and that there'd be a statutory declaration signed to effect this.*
>
> *…I don't know that we were actually told that it was Gilberthorpe but, effectively, that we would have a statutory declaration saying that … the certificate of title would be produced within a week or two weeks or something… Meanwhile, Patrick said to us, Peter and I, that a caveat would suffice and protect our position whilst we were waiting on the certificate of title… We asked Patrick at the time, as long as you're happy with it then you can proceed.[13]*

[16] Later he said:

> *What else did Mr Schmidt tell you in – in that telephone call? Did you ask him anything about whether you should proceed or not? ---*
>
> *Yes. When I said this earlier to Patrick Schmidt, our position, both Peter and my position, was that because it was a first mortgage and the caveat was able to be lodged, we asked, "Will that protect our position?" Or actually, I think Patrick might have volunteered that information and said that it would protect our position. And we said, "Well provided that you guys", like Patrick, Galilee Solicitors, "is satisfied with it, we're happy to proceed."[14]*

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9 Vol I, Tab 9.
10 T1-79 line 20.
11 T1-81 lines 30-40.
12 T1-34 line 20-40.
13 T1-35 lines 11-45 and T1-36 lines 1-2.
14 T1-37 lines 29-35.

[17] Later Mr Dormer agreed that the funds for this transaction came direct from Owl to Galilee's trust account.[15]

[18] Under cross-examination Mr Dormer agreed that prior to starting PSAL Limited he was involved in programming and also did some developments as well as mortgage finance with his business partner.[16] He agreed that his business partner who was a director or a founder of PSAL was in mortgage finance as a broker for Westpac.[17]

[19] Mr Dormer said that the security involved in all the loans PSAL was involved with had real estate as a minimum and included taking first, second or third mortgages. He agreed that he knew the difference between a mortgage and a caveat and he was aware of a process called "caveat lending". He agreed that PSAL had transactions in which caveat lending was the approach taken.[18] He said:

> *Okay, to answer your question, we were always of the understanding that – like, if it was going to take time to actually lodge the mortgage because every single loan we did we had mortgage documents, not just be it a caveat or what have you. If it was a temporary situation in that, as you have mentioned, like, that where we had to wait for a first mortgagee consent then a caveat would have been lodged and so the answer to your question – that's – assume that answers your question. Did we only do caveat, no.*[19]

Later:

> *No. I didn't ask whether you only did it I just asked you whether that was fairly common practice for PSAL?*
>
> *Well, it was a – it was always a common practice for us to be able to protect or make sure that our security was protected under an instrument. And if that was under the advice of Galilee to – that we had a caveat while we were waiting for the mortgage then that's what we did.*[20]

Later he disagreed that it was a common practice.[21]

[20] The evidence reveals that the caveat was not agreed to by Thatcher and was released after the loan was advanced.

[21] Mr Dormer agreed that PSAL had been dealing with Owl as one of the funders for some time and had a relationship that was important to him.[22] When he was asked whether the repayment to Owl was to keep Owl happy rather than because PSAL had lent the money to Gilberthorpe and Thatcher, he replied:

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15 T1-41 lines 18-22.
16 T1-47 lines 12-13.
17 T1-47.
18 T1-55.
19 T1-57 line 43.
20 T1-58 line 5.
21 T1-58 line 20.
22 T1-84 lines 43-46.

> *We did we paid Owl in the day we were due and owing and yeah – to maintain our relationship as, you know we were going to pursue the debt for – to recover our like, the loan.*[23]

The following exchange then occurred:

> *And you say that the agreement you had with Owl was that if the loan went – if the borrowers didn't repay – let me withdraw that. Is it your case that the agreement that you had with Owl was that, if the borrowers did not repay PSAL would repay Owl?*
>
> *It was a case of PSAL – we ran a contingency fund which allowed for, in the event of a borrower to where we'd pursued it legally and recovered no money, then PSAL would pay at that loan and we did that on more than one occasion, not necessarily Owl but to other debt funders*.[24]

And later he said:

> *So when we couldn't recover the moneys from the people we lent it to, the last resort – the last resort was that we could access our contingency fund to basically heal the wound of the debt funder not necessarily the whole one 100 cents to the dollar, but we would do our utmost best to do it.*[25]

Mr Robert Wilson

[22] At the relevant time Mr Robert Wilson was a director of Owl. He gave evidence that his company did not and had not retained the defendant as its solicitors. Prior to the loan, the subject of these proceedings, Owl would have had one or two loans with the plaintiff. He said that on the other occasions there was a facility agreement similar to the document contained in Volume 1 Tab 31. He said that repayment of the loan would usually be made by the ultimate borrower to PSAL and by PSAL to Owl. He said if the funds were not paid back by the borrower then PSAL would repay Owl.[26] He said in this case Owl had been paid in full by PSAL, however he agreed that in the affidavit supporting the recovery proceedings in New South Wales he had sworn that Owl was the lender under the loan agreement. He could not remember signing the facility agreement in this particular transaction, although he assumed one would have been signed.[27]

Mr Peter Flanders

[23] Mr Flanders gave evidence that the plaintiff acted as a lender, or co-lender with a debt funder, or as a manager of the loan.[28] He said that in relation to this loan the plaintiff acted as a lender. He said that the defendant was the plaintiff's solicitor from about 2006 and had acted for the plaintiff in about 50 transactions of this

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23 T1-85 lines 9-10.
24 T1-85 line 15.
25 T1-85 lines 43-46 and T1-86 lines 1-3.
26 T1-92.
27 T1-95 lines 45-47; T1-97 lines 44-47; T1-98 line 1.
28 T2-3 lines 29-30.

nature. He said the background of the relationship was that they had had several meetings with Brad Booth of Galilee, who ran the Queensland office. When asked what discussions he had with Mr Booth about the terms of what Galilee were retained to do he answered:

> *I guess general discussions about we were doing and what we wanted to do before we started, and what we'd require of them in the way of the legal side of it and the advice on the documents and things.*[29]

He was then asked:

> *Okay. Can you elaborate on that part of it for Her Honour, please? What specific instructions were given to Galilee on a standing basis for that advice, as you call it?*
>
> *What advice?*
>
> *Well, their role was to advise on the legitimacy of the documents to make sure the borrowers were real, etcetera. Our role was mainly to assess the value of the properties and to look at the repayment method, if that was feasible.*[30]

[24] He said that when it came to Galilee being retained, the solicitors were provided with a set of solicitors' instructions and some supporting documents and he identified Volume 1 Tab 6 as the document.[31] He identified Document 31 in Volume 1 as being a normal facility agreement with a funder. He thought such a document would have been executed in relation to this particular transaction but did not know the whereabouts of the document.[32] He said he was not sure if in this transaction there was an expectation that the plaintiff would be nominated as a lender, although it was normal practice to be on the documents as a co-lender.[33] He agreed that it was a reasonably common scenario in 2009 for PSAL to organise through its solicitors for a caveat to be lodged pending the consent or the original certificate of title when there had been a delay, although he restricted that scenario to a second mortgage.[34] He was aware of the term "caveat lending". He gave evidence that one of the roles PSAL undertook was as a mortgage manager and it did so even when it was a lender on the transaction, but he agreed there were occasions on which PSAL was not the lender.[35]

[25] He agreed that in Volume 1 Tab 31 PSAL was described as the mortgage manager. He agreed that on the loan agreement Owl was named as the lender and that as the lender it did not require a facility agreement between it and PSAL. He agreed that he had not signed a loan agreement or a mortgage in the name of PSAL for this transaction.[36]

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29 T2-4 line 5.
30 T2-4 line 1-10.
31 T2-4 line 25.
32 T2-7 lines 16-20.
33 T2-11 line 30.
34 T2-16 line 15.
35 T2-18 line 30.
36 T2-26 line 40.

[26] He said that the plaintiff had been invoiced and had paid the defendant in respect of invoices for the Gilberthorpe transaction as evidenced by Volume 2 Tab 181. He agreed that the Form 201 indicated to the defendant that the loan agreement was to be prepared with Owl as the lender but qualified that answer by saying "it was normal practice that we were on there as well".[37]

[27] He gave evidence of a telephone conversation between Mr Schmidt and he and Mr Dormer. He said that he and Mr Dormer were on the speaker phone in the car when Mr Schmidt rang. Mr Schmidt told them that the certificate of title had gone missing and that he was informed so by Mr Gilberthorpe. He was asked:

> *And what did you say to him?*
>
> *We asked him what the repercussions were.*
>
> *And what did he say?*
>
> *We had a conversation. The – I guess the wrap up of the conversation was, we always asked Galilee and relied on them in the end we said to him, "What do you think?" And he said something like, "I think it should be okay".*
>
> *And …when he said to you, "I think it should be okay", what did you understand him to mean by that?*
>
> *Well, we had the protection that we required and that we were okay to settle the loan.*[38]

[28] Later, speaking of the telephone conversation he said:

> *We asked Patrick what he thought about it, etcetera, and he said that it should be okay and we took that as proceed.*[39]

[29] He was asked:

> *PSAL had by that stage settled other transactions without having a CT but only have a caveat in place, hadn't it?*
>
> *Second mortgages, yes.*
>
> *So was that fact, that the CT wasn't available and a caveat would be lodged, it wasn't something out of the ordinary for you?*
>
> *I guess in this case it was a first mortgage so it was a different question.*
>
> *But, for example, you didn't need Mr Schmidt to explain to you in that conversation what a caveat did?*
>
> *No.*[40]

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37 T2-26 line 85.
38 T2-5.
39 T2-27 line 45.

[30] It was suggested to Mr Flanders that repayment by PSAL to Owl was a commercial decision in order to preserve the relationship that PSAL had with Mr Wilson. He answered:

> *It was my understanding we had an obligation to repay the debt*.[41]

[31] Mr Flanders said he thought they were the lenders but he did not check any of the documents to see that they were. He was cross-examined about the affidavit he supplied for the summary judgment hearing in New South Wales and he agreed that there was incorrect information contained in it, including that he was a director of Owl. He said he thought it was for PSAL when he signed it and did not read it correctly.[42]

Mr Patrick John Schmidt

[32] Mr Schmidt was admitted as a solicitor in May 2008 and joined the defendant in December 2008 in the Sydney office. He left in January 2010 and said it was because of personal disagreements and not because of the present matter.

[33] By December 2009, Mr Schmidt had been involved in about half a dozen matters with the plaintiff. His understanding was that the plaintiff was a sourced lender. He said the plaintiff was sometimes a lender but on the majority of loans he dealt with, the plaintiff sourced the finance and then acted as the agent.[43] He said that in his experience the plaintiff regularly lent on caveat security only and this was the only transaction he dealt with where a first mortgage was required. He said in relation to this transaction he was told Owl was the lender and the money went directly from Owl to the trust account. He was not aware of a standing instruction that the plaintiff was to be a lender on the documents. He thought he was protecting Owl's interests, even though it was Dormer and Flanders sending instructions.[44] He thought that the plaintiff was the agent to seek a funder and to do due diligence and he said that the Form 203 and the Form 201 supported his view.[45]

[34] Mr Schmidt was shown Volume 1 Tab 9, which was an email sent to the solicitors for the borrowers and copied to Mr Flanders from PSAL. The email attached a copy of the loan agreement where the lender was nominated as Owl. He said he could not recall whether he received a reply to that email.[46]

[35] Mr Schmidt gave evidence that he had conducted a New South Wales Law Society solicitor search for the person, Stacy Kelly, the person who witnessed the certificate of identification for Thatcher that comprised part of the loan documents, to verify that she was a solicitor.[47]

[36] Mr Schmidt agreed that he had contacted Mr Flanders after his conversation with Gilberthorpe. He said he advised him that the original Certificate of Title had been lost and that Gilberthorpe would be prepared to sign a statutory declaration saying

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40 T2-28 lines 14-22.
41 T2-31 lines 2-3.
42 T2-33 line 28.
43 T2-58 line 20.
44 T2-59 line 10.
45 Volume 1 Tab 6.
46 T2-65 lines 1-3.
47 T2-65 line 30.

he would get the certificate of title within two weeks. He said he was not asked whether the caveat and the statutory declaration were sufficient to protect PSAL's interest.[48] He was referred to a file note of the discussion contained in Volume 1 Tab 34 which read as follows:

> *Could not get written instructions only verbal as clients on the road travelling to Dubbo.*

[37] The note said that the conversation was with Peter Flanders and that it happened at 2.30pm on 29 December 2009. The note said as follows:

> *Advised him that original CT has been lost and it normally takes around two weeks to replace. I stated that Jason would be prepared to sign a stat dec saying that he would get the CT to us within 2 week. I also advise that we could not get a solicitor undertaking as they were on holidays. Peter was happy to proceed with the loan on the basis that a stat dec was provided and CT produced to us within two week. I stated that we would lodge the caveat in the meantime.*

[38] At 9:09 am on 30 December 2009 Mr Schmidt emailed Mr Gilberthorpe. The email said in part:

> *Dear Jason,*
>
> *I refer to the above matter and the funds due to be advanced.*
>
> *I confirm that as a result of the Christmas break, I have the authority to deal with you directly as you [sic] solicitor is away*.[49]

[39] Under cross-examination Mr Schmidt agreed that he was the lawyer for the plaintiff and part of his function was to advise of things he considered necessary to protect his client's interests. He said that is why he had a discussion with Flanders and Dormer. He agreed that he was aware that Mr Flanders and Mr Dormer were not lawyers and that they had retained Galilee for reward to get advice, amongst other things. He agreed it was necessary for him to ensure the advice he gave was complete and accurate and of assistance to them.[50] He agreed that he assumed that having a statutory declaration and a caveat adequately protected the plaintiff's interests. He said the caveat protected their interests in numerous ways.[51] He said that even though this loan was a first mortgage and there was a need to obtain the original certificate of title so that the mortgage could be registered, the plaintiff's interests were protected with a caveat.[52]

[40] He said it was his understanding that the security was always going to be a first mortgage and that he believed it was protected until then by the caveat.[53]

[41] Mr Schmidt said he did not advise PSAL as to their situation. He simply told them their options.[54] When asked whether he thought it was an additional risk that the

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48 T2-70 lines 1-2.
49 Volume 1 Tab 49.
50 T2-70.
51 T2-71 lines 16-17.
52 T2-72 lines 10-20.
53 T2-72 line 20.

statutory declaration he was taking from Gilberthorpe was in relation to the provision of certificate of title from somebody else's property, he responded: "But that's where the due diligence came in from PSAL…"[55] He said PSAL knew the situation was that he was getting a statutory declaration from someone about the provision of someone else's Certificate of Title.[56]

[42] He said because of the Christmas break he was not able to get in touch with the lawyers for the borrowers. When it was put to him that he did nothing at all to protect the interests of his clients he replied:

> *Well no, that's incorrect. I was trying to get this caveat and put it on there – on the title, to push through the loan.*[57]

He was asked:[58]

> *You didn't tell them it was a real problem, and you didn't tell them not to proceed with it?*
>
> *No. I told them it was a real problem and this is your options should you want to proceed.*
>
> *Do you accept now you should've told them, "Don't do it"?*
>
> *Well, that's not my decision to make.*

Later he said:

> *I believed I advised them of the situation of what it was, and then they made the decision. It was a commercial decision.*[59]

Bradley Donald Booth

[43] Mr Booth was a solicitor with the defendant's firm. He left in 2012. He was introduced to PSAL through a mortgage manager client.

[44] Mr Booth could not remember a formal retainer agreement with PSAL.[60] He said that his understanding of the typical borrowers for PSAL were that it was someone who had issues in getting finance from a conventional lender. The securities for the loans were first, second or even third mortgages and, in New South Wales particularly, caveats were used when there was a delay in obtaining a paper Certificate of Title.[61]

[45] He said that when the defendant dealt with the plaintiff there was a standard letter of instructions which he identified as Volume 1 Tab 6. He said if there was to be more than one lender he would expect to see it set out in a letter of instructions and if the

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54 T2-72 line 44.
55 T2-75 line 1.
56 T2-75 lines 10-15.
57 T2-76 lines 16-18.
58 T2-18 line 5.
59 T2-78.
60 T2-91 line 20.
61 T2-93 lines 26-31.

plaintiff was not listed in the letter of instructions he would not expect the plaintiff to be a lender. He denied there was standing instruction from the plaintiff that it would be a lender in all transactions.[62]

[46] Mr Booth said that the defendant did not assess or pretend to assess the risk from a credit point of view.[63] In transactions where the plaintiff indicated that a third party was the lender, Mr Booth believed that the defendant was acting in the interests of the lender, albeit taking instructions from the plaintiff.[64] He was not aware of the arrangement between the plaintiff and Owl if the loan became unrecoverable.[65] He was aware of the recovery proceedings in New South Wales and he considered the defendant was acting on behalf of Owl.[66] He could not recall anyone complaining on behalf of the plaintiff that the plaintiff was not named on the loan documents.[67] Under cross-examination he was asked what Mr Schmidt should have done. He answered:

> *He should have spoken to our client PSAL immediately and let them know the scenario, it didn't have a certificate of title, what are your instructions and would have advised them what's the impact of not having a certificate of title…*[68]

[47] He said the defendant did not act for Owl and the defendant did not have direct contact with Owl, but acted for Owl "in a lender sense" and the instructions came from the plaintiff.[69] The defendant's fees were capitalised into the loan but the recovery proceedings were billed to the plaintiff.[70]

The arguments on whether the plaintiff and defendant had a solicitor-client relationship in relation to this transaction

[48] The plaintiff argues that there are two main bases upon which the Court would find that the defendant was retained by and acted for the plaintiff: firstly, by express agreement to do so, and secondly, if necessary, by implication.

[49] It is not in dispute that there was a history of the defendant acting for the plaintiff.

[50] The instructions to solicitors were from the plaintiff to the defendant. The loan documents were emailed to Mr Flanders. When Mr Schmidt was approached by Gilberthorpe, he said he would contact "his clients" and he contacted Mr Dormer and Mr Flanders. Under cross-examination, Mr Schmidt agreed that he believed the original certificate of title was required to protect "your client's interests".[71] He took instructions to proceed from Mr Flanders and Mr Dormer. Mr Booth referred to the plaintiff as "our client PSAL".[72] Mr Booth also said during examination-in-

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62 T2-94 lines 33-34.
63 T2-95 lines 26-28.
64 T2-95 lines 40-45.
65 T2-97 lines 45-47.
66 T2-99 line 45.
67 T2-100 lines 25-27.
68 T2-103 lines 44-48.
69 T2-108 lines 20-27.
70 T2-108 lines 38-46.
71 T2-72 lines 1-3.
72 T2-103 lines 44-45.

chief that he did not act for Owl and did not have any direct contact with Owl.[73] Mr Booth also conceded the accuracy of the documentary evidence[74] that the defendant billed the plaintiff for the recovery action in New South Wales in addition to receiving its fees as part of the principle loan transaction.[75] Mr Wilson gave evidence that Owl did not retain the defendant to act for it, and he was not challenged in relation to that evidence.

[51] In this case, several facts were identified as being relevant to the determination of the question of whether a retainer ought to be implied, including for whose protection the loan documents were drawn, whether the putative client (the lender) believed the solicitor was looking after his interests in that regard, and whether the solicitor did anything to disabuse the putative client of that belief.

[52] The defendant argues that the plaintiff was acting as mortgage manager and not as lender in this transaction. Accordingly, even if the Court accepts that the plaintiff retained the defendant to provide legal services with respect to the plaintiff's interests, that retainer was limited to protecting the plaintiff's narrow economic interests as mortgage manager and not as lender. The defendant argues the following matters point to the fact that the defendant was engaged to prepare loan documents in order to give protection to the real lender, Owl Projects.

1. The email from the plaintiff to the defendant attaching the letter of instructions.

2. The terms of the letter of instructions.

3. The preparation by the defendant of the loan documents "relating to the proposal owned by Owl to the borrowers including forms of mortgage etc".

The law on retainer

[53] A retainer may be inferred from a close examination of the actual conduct of the parties in the absence of their express words.[76]

[54] If it is to be inferred, the relationship of solicitor and client has to be a necessary and clear inference from the proved facts before a retainer will be presumed.[77]

[55] As was stated in *Integrated Computer Services Pty Ltd v Digital Equipment Corporation Australia Pty Ltd*[78] the question in respect of an implied retainer is whether the conduct of the parties, viewed in light of the surrounding circumstances, shows a tacit understanding or agreement. The conduct of the

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73 T2-108 line 20.

74 Exhibit 1, Volume 2 Tab 181 and Volume 3 Tab 233.

75 T2-108 lines 30-35.

76 *Pegrum v Fatharly* (1996) 14 WAR 92, 102 (Anderson J); applied in Queensland in *Stringer v Flehr & Walker & Anor* [2003] QSC 370 (Philippides J) and in *Vella v Gustafson* [2009] QSC 424 (Martin J).

77 *Pegrum v Fatharly* (1996) 14 WAR 92 at 95 per Ipp J, applying *Australian Energy Ltd v Lennard Oil NL* [1986] 2 Qd R 216 at 237 per Thomas J.

78 (1988) 5 BPR 11, 110 at 11, 117.

parties must be capable of proving all the essential elements of an express contract.[79]

[56] Here, the facts are clear that the plaintiff provided the solicitor's letter of instructions to the defendant. All contact relating to instructions was with the plaintiff. The conversation concerning the certificate of title was with the plaintiff. There was no contact between the defendant and Owl. Owl did not think the defendant was looking after Owl's interests.

[57] It appears to me that both the plaintiff and the defendant considered and treated each other as solicitor and client. Further, the defendant did not disabuse either the plaintiff or Owl of the understanding that the defendant was acting for the plaintiff. I am satisfied that there was a solicitor-client relationship between the plaintiff and the defendant because I find, as later explained, that Owl was the lender, and that the scope of the retainer was for legal services in relation to PSAL's role as mortgage manager.

The contents of the conversation between Mr Schmidt and Mr Flanders and Mr Dormer on 29 December 2009

[58] I prefer Mr Schmidt's version of the conversation. I accept his version that he told Mr Flanders and Mr Dormer of the situation relating to the certificate of title in order to obtain their instructions as to whether to proceed. I accept that he did not advise it was safe to proceed. The reasons I have come to this view are as follows:

(a) I do not accept the evidence of Mr Dormer and Mr Flanders on the aspect of whether or not there was a standing instruction to include PSAL as co-lenders. There is no such document in evidence and if it were a standing instruction one might expect to see it in the Form 201. Mr Booth denied it was a standing instruction.

(b) I accept the loan documents were forwarded to Mr Flanders before settlement.

(c) I find there was no complaint about the loan documents not containing PSAL as co-lenders prior to the transaction settlement.

(d) Mr Dormer said that the defendant retained the documents but the documents were emailed to Mr Flanders. Mr Flanders said he did complain after the transaction but there is no documentary evidence to support that as he says it was in a phone call rather than an email. Having seen the email traffic between the plaintiff and the defendant I find that hard to accept.

(e) Mr Schmidt produced a contemporaneous file note of the conversation which indicates he explained the situation and took instructions. The content of the file note is supported by the email to Mr Gilberthorpe the next day, advising that he had authority to deal with Mr Gilberthorpe because of the Christmas break.

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79 Applying *Australian Energy Ltd v Lennard Oil* [1986] 2 Qd R 216 at 217, per Thomas J.

(f) I also accept Mr Schmidt's version of that conversation because I accept his evidence was that he thought PSAL was financially and commercially capable. They had been involved in transactions such as this for longer than he had.

(g) I accept his evidence that, to his knowledge, PSAL had conducted caveat lending on a number of occasions and I think that he would have been happy to take the instructions from experienced lenders.

(h) The evidence supports the inference that the plaintiff was likely to want to proceed with the loan at that advanced stage of the transaction.

[59] The question of whether Mr Schmidt should have given advice is of course a different question. However, I am satisfied that the conversation took place in the way in which Mr Schmidt said, because I am left with the impression that Mr Flanders and Mr Dormer have their recollections blurred perhaps by wishful thinking.

Breach of duty of care

The fraud

Gilberthorpe represented to the defendant that Emily Thatcher:

(a) was his mother, which was false, as she was his neighbour;

(b) that she was willing to borrow funds secured by first registered security over 4 Warandoo Street, Hornsby, which was false, as she had no such intent;

(c) that she was related to Smart Art, which was false, as she had no dealings with or knowledge of Smart Art because she was an 85 year old widow who was partially blind and suffered from dementia, such that her financial affairs were managed by a Power of Attorney.

Between 24 and 27 December 2009, documents in the "security packet" were delivered to the defendant's Sydney Office. All the documents in the security packet purportedly executed by Thatcher were forged. The signature of the purported witness to Thatcher's signature (Stacy Kelly, solicitor) was forged.

[60] The plaintiff says that in the circumstances in which the defendant received the security packet, before the defendant could be reasonably satisfied that the mortgage was a genuine instrument, it would have had to have been reasonably satisfied that the certificate of identification for Thatcher was genuine.

[61] Further, the plaintiff there was an implied obligation that there had to exist a certificate from a solicitor (separate to Gilberthorpe's solicitor) stating that Thatcher had obtained independent legal advice and understood the nature of the loan.

[62] The plaintiff alleges that it should have been apparent to the defendant that:

(a) The purported certificate of identification for Thatcher was not by her regular solicitor.

(b) The solicitor who was said to have witnessed the certificate, Stacy Kelly, offered no telephone contact or email address, did not identify the firm of solicitors for whom she worked, and did not identify the level of the building where she worked.

(c) The only identification purportedly produced by Thatcher to Stacy Kelly was a "war widow's card" which seemed unlikely to be documentary proof of identity that a reasonable solicitor would rely on in such a case.

(d) The signatures of Stacy Kelly on the various documents had a degree of variability.

(e) The certificate of identification came to Galilee from Gilberthorpe and not from Thatcher.

[63] The plaintiff argues that, because of the above matters, a reasonably competent solicitor would have had reasonable suspicions or concerns about the bona fides of Mrs Thatcher's certificate of identification and the documents contained in the security packet.

[64] By reason of those matters, it is argued a reasonable solicitor would have been put on notice that the plaintiff's interests might be at risk from fraud.

[65] The plaintiff argues that the defendant should have been made more suspicious when Mr Gilberthorpe asserted the original certificate of title had been lost, and that he could not get a solicitor's undertaking to produce the document as they were on holidays.

Amongst other things, the fact that those assertions were not by Thatcher or her solicitor but by Gilberthorpe should have made the defendant more suspicious and meant that the defendant could not have had a reasonable belief that the mortgage and the security packet was a genuine instrument.

[66] It is also alleged that because of the above, a reasonably competent solicitor in the position of the defendant would have advised Mr Flanders that the transaction looked suspicious and that it would be prudent not to make the advance until such time as the possibility of fraud could be ruled out.

[67] The plaintiff says that the defendant breached its obligation by failing to establish the bona fides of Stacy Kelly, not advising PSAL that Stacy Kelly had not signed the certificate of independent solicitors advice, not advising PSAL that the transaction looked suspicious and that fraud could not be ruled out, and not advising PSAL that the firm could not form a reasonable belief the mortgage was a genuine instrument. In addition, the plaintiff pleads the defendant's advice was inadequate because it did not convey to PSAL the reality of the risks that it was assuming by proceeding, namely that:

(a) The letter of offer from PSAL apparently signed by Mrs Thatcher may not be a genuine instrument;

(b) The loan agreement between OWL and the borrowers in the security packet may not be a genuine instrument;

(c) The mortgage between OWL and the borrowers in the security packet may not be a genuine instrument.

The defendant's argument

[68] As to the complaint that the defendant ought not to have been satisfied that the certificate of identification for Thatcher was bona fide, the defendant says that the certification does not indicate that the witness must be a solicitor but does ask for the witness to state their occupation.[80] Nevertheless, Mr Schmidt conducted a search of the New South Wales Law Society website and ascertained that Ms Kelly was admitted to practice as solicitor.[81]

[69] Further, the defendant argues that the letter of instruction did not require the defendant to verify the identity of the borrowers. On the contrary, the instructions were consistent with the identification check being carried out by the broker, who would supply it to the plaintiff (not the defendant).

[70] Mr Schmidt also received an insurance notification for the security property. The notification named Gilberthorpe and Thatcher as the insured and the policy had been sent to the solicitor, Worthington, who had been nominated as Gilberthorpe's solicitor.[82]

Expert testimony

[71] Expert reports were obtained on behalf of both parties. There is no real dispute that the standard of care required is that of a reasonably competent solicitor.

[72] Mr Peter Barakate gave a report on behalf of the plaintiff. He said that it was not unusual that the witness Stacey Kelly had not provided a contact telephone number or email address, and that it was not unusual for solicitors to refer to the street address of their building without referring to the level or suite number within the building containing their offices. Mr Barakate said the identification by means of a "war widow card", although unusual, was permitted by the certificate of identification. He did, however, think it was unusual that Ms Kelly did not identify the firm for which she worked.

[73] That said, it appeared to me that Mr Barakate placed more emphasis on the fact that there was no evidence to suggest that the defendant had made contact with Worthington in respect of Thatcher's involvement in the transaction. In fact, documents were prepared and sent on 23 December 2009 by email from the defendant to Thatcher, care of the solicitor Worthington. On 23 December 2009, Worthington sent a certificate of insurance for the subject property to the defendant.

[74] Mr Barakate also placed some emphasis on the fact that there should have been a search of the New South Wales Law Society's website to determine whether Ms

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80 Exhibit 1, Tab 18.
81 Exhibit 1, Tab 60.
82 Exhibit 1, Tab 8.

Kelly was a solicitor practicing in New South Wales. In fact, Mr Schmidt had performed such a search.

[75] Mr Barakate did not think there was any significant variability in the signatures attributed to Stacy Kelly.

[76] Mr Barakate was firm in his evidence that a reasonably competent solicitor should not have had any direct dealings with Gilberthorpe or Thatcher except as permitted under r 31 of the *Law Society of New South Wales Professional Conduct and Practice Rules.*

[77] Mr Barakate said that the advice that the statutory declaration and the caveat was sufficient to protect the lender was not consistent with the duties of a solicitor acting for the lender. He noted that the statutory declaration was in draft form and that while it contained an undertaking from Gilberthorpe, no reasonably competent solicitor would have accepted an undertaking from anyone other than another solicitor. He said a reasonably competent solicitor would not settle a transaction of this nature on the strength of a caveat without also having a certificate of title for the property.

[78] In Mr Barakate's view, the advice given to the plaintiff in the circumstances should have been that:

(a) There was irregularity in the certificate of identification provided in relation to Thatcher; and

(b) It was not in PSAL's interest to advance the loan on the strength of an unstamped mortgage without the Certificate of Title or at the very least an undertaking from Thatcher's solicitor that he would provide the Certificate of Title within two business days of completion to facilitate registration of the mortgage.

[79] He agreed under cross-examination that the fact that documents had been sent to the solicitor Worthington, and that Worthington had sent back a certificate of insurance, and that Mr Schmidt had conducted a search in respect of whether Kelly was an admitted solicitor, would "make a difference to a degree". He maintained, however, that he would have queried why Kelly was now involved and providing the independent advice. When challenged that it was the certificate of identification which was being discussed he answered:

> *For identification – if it's merely as to identification you could – you could leave it at that but why Kelly has jumped into the equation I don't quite understand*.[83]

[80] Later, in respect of the certificate of independent advice, he said:

> *I myself would be wondering why that – if I had received the documents I'd be wondering why another solicitor had been retained for that purpose without me being notified of any change of – of lawyers especially when Worthington had responded, as you said earlier, and had sent a certificate of – of – of currency for the*

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[83] T2-45 lines 41-43.

> *insurance for the house. So it seemed that Worthington was – had current retainer in the matter.*[84]

He was then asked:

> *And do you think that – is that – would you say that's the standard of a reasonably competent solicitor, or is that the standard of – the gold standard – to make that inquiry?*
>
> *I – look, it's difficult to answer. I find that in matters that I work on – and it's the same for – for my colleagues – that you tend to work for one appointed solicitor – work – sorry – with one appointed solicitor for the person on the other side of the transaction until notified otherwise. So I don't – yes it should be the goal to make that the inquiry but it's peculiar that there's a change midstream.*
>
> *But what you're being asked what you're being asked about is what a reasonably competent solicitor would make of it?*
>
> *Look, I would have thought so.*
>
> *But it shouldn't – it doesn't matter what you did or what the gold standard is. But what would a reasonably competent person do? I would've thought so, when Worthington had responded earlier.*[85]

[81] Later Mr Barakate was asked:

> *If I told you that there is – that Mr Schmidt had obtained instruction to settle the transaction on the basis that there was also a caveat in place would that change your view?*
>
> *Well, yes, it would. Because if the client's saying that the mortgage is secondary to the caveat then the client's able to change its instructions.*
>
> *Is saying to the client "The stat dec plus the caveat is sufficient to protect your interests" something a reasonably competent solicitor would do?*
>
> *A reasonably competent solicitor could not say that, in my view.*
>
> *And that's because of your view about the statutory declaration, not the caveat?*
>
> *Well, it's about both, really. The statutory declaration, or undertaking, rather is from a non-solicitor.*[86]

[82] He explained that solicitors are bound to honour their undertakings and he explained that a caveat does not block all dealings with the title, so if someone had a prior

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84 T2-47 – T2-48.

85 T2-47 lines 45-48. T2-48 lines 1-20.

86 T2-50 LINES 14-26.

interest on the title the caveat would not stop that interest holder dealing with the title. Later he said:

> *I think that a reasonably competent solicitor would need specific instructions to say that in this matter a caveat would be acceptable in place of a mortgage. In other words, I do not think you could take the client's practice in other matters as being the instructions in this matter where the instructions are clearly to get a first registered mortgage on the title*.[87]

[83] Mr Peter Rosier prepared a report and gave evidence on behalf of the defendant.

[84] Mr Rosier said in his experience and opinion, in New South Wales, it is not and never has been the common professional practice of a reasonably competent solicitor to check the existence or details of a solicitor who witnesses loan documents. He said when a solicitor acting for a party who is to rely on the document received that document, it is usual practice for the solicitor to check the document carefully so as to ensure that it is correct and will have effect according to its terms for the purpose for which it was brought into existence. This checking would include ensuring that the document is properly executed. He said it would not be a departure from usual practice for the solicitor to accept that the signatures were those real persons' who had in fact witnessed the execution of the document.

[85] In his opinion, in 2009, usual practice would have required a solicitor in Mr Schmidt's position to ensure that the witness was a solicitor in New South Wales holding a practicing certificate, but would not require that solicitor to check whether the solicitor had in fact witnessed the signature. He said in everyday practice solicitors and conveyancers accept that documents are correctly and properly signed without going to the witness to ask if there was proper execution. To do so would not only be impractical, if not nearly impossible. Moreover, the concern about identify theft in 2009 was more concerned with the verification of the identity of the person being bound by the signature, not of the person who is witnessing it.

[86] Mr Rosier was also of the opinion that, in the circumstances of the matter occurring over the Christmas period, he believed that many people with an association to a particular solicitor and in need of legal advice would use any available solicitor if the solicitor they normally used was not available. He was of the opinion that it would not be a matter of concern, nor a departure from usual practice, if a solicitor in the position of Mr Schmidt accepted the loan documents offered to him, notwithstanding that the signature of the borrower had been witnessed by a solicitor other than the one noted as acting for the party. Nor did Mr Rosier think that a reasonably competent solicitor would only deal with the party's solicitors and not receive documents from Gilberthorpe directly. The rule concerning dealing directly with a party was to protect the unrepresented party. He thought in the circumstances of this matter, being a short term high interest rate lending experience where the material suggested that the money had been placed in the trust account of the defendant, and where emails suggest the client expected settlement to take place on Christmas Eve, and where the emails from the plaintiff noted the importance of the matter as high, it would not be unusual or a matter of concern that Mr Gilberthorpe delivered the documents directly.

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87 T2-52 lines 43-47 and T2-53 lines 1-2.

[87] It is submitted by the plaintiff at paragraph 50 that I should prefer the evidence of Mr Barakate to that of Mr Rosier because the defendant's solicitors inexplicably failed to inform Mr Rosier of the fact that Mr Schmidt had failed to obtain the certificate of title, "a crucial element of the case, purposefully ignored".

[88] At paragraph 57 the plaintiff submitted:

> *As to the issue of the certificate of title. Mr Schmidt did not understand the notion of indefeasibility of title. His lack of understanding is important as it perhaps answers the question as to why he thought a caveat and or a statutory declaration / undertaking for a non-lawyer would be 'enough'.*
>
> *Mr Booth understood the distinction and importance of obtaining the original certificate of title and conceded the errors in respect of same.*
>
> *The Defendant chose to ignore this aspect of the case and did not obtain any evidence from Mr Rosier about it. In light of the concessions that were made by Mr Booth about the point, it is unsurprising why it chose such course. In any event, the Court only has the evidence of Mr Barakate about this issue.*

[89] In reply, the defendant argues that the plaintiff ought to be confined to its pleaded case. The defendant points to the plaintiff's written submission that there was a breach of duty by "failing to obtain the original certificate of title prior to settlement". The defendant says that is not part of the pleaded case on breach (or duty). The defendant says that the complaint was that the conversation with Gilberthorpe and the factors surrounding the witness, Stacy Kelly, ought to have made the transaction "more suspicious" and the defendant did not convey to the plaintiff the "reality of the risk" that the documents may not have been genuine: see ASOC [34].

[90] The defendant argues it did not have the opportunity to adduce evidence from Mr Schmidt, Mr Booth or Mr Rosier regarding the case now sought to be made that it was either part of the defendant's duty to obtain the certificate of title or, in the circumstances, a breach of the defendant's duty not to obtain the certificate of title.

[91] In addition, the defendant says it was not part of the plaintiff's case that it was a breach of duty to rely on "an undertaking by a non-lawyer" and it was not part of the plaintiff's case that it was a breach of duty to rely on an undertaking regarding a property owned by another person. The defendant says the plaintiff's case ought to be confined to that pleaded and it is no part of that case that the defendant was obliged, by exercising reasonable care, to obtain the certificate of title.

[92] In *Holdway v Arcuri Lawyers*,[88] His Honour Keane JA (as he then was) cited passages from Isaacs and Rich JJ in *Gould v Mount Oxide Mines Ltd (in liq)*.[89] His Honour also cited the following passage from *Banque Commerciale SA v Akhil Holdings Ltd*:

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[88] [2009] 2 Qd R 18; [2008] QCA 218.
[89] (1916) 22 CLR 490.

> *The function of pleadings is to state with sufficient clarity the case that must be met: Gould and Birbeck and Bacon v Mount Oxide Mines (in liq) (25), per Isaacs and Rich JJ. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a different basis from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities. See e.g. Brown v Dunn (26); Mount Oxide Mines (27).*
>
> *Ordinarily, the question whether the parties have chosen some issue different from that disclosed in the pleadings as the basis for the determination of their respective rights and liabilities is to be answered by inference from the way in which the trial was conducted. It may be that, in a clear case, mere acquiescence by one party in a course adopted by the other will be sufficient to ground such an inference. In the present case, the Bank not having been present at the hearing, there could be no acquiescence by it in such course, if any, by which Akhil might have attempted to extend the issues at the hearing to encompass a case of fraud as against the Bank. Nor, in our view, can acquiescence be inferred from the Bank's failure to participate in a hearing coupled with its knowledge that an allegation of fraud on its part had been erased in the amended reply to the defence filed against Mr Messara. That was a bare and unparticularised assertion. In that context, a choice by the Bank to have its liability determined on the basis of fraud would be tantamount to a decision to forgo the right to be informed of the case to be made against it. The facts will not support such an inference."*[90]

[93] Accordingly, *Akhil* was entitled to only such relief as was available on the pleadings.

[94] It seems to me that the plaintiff did not plead that there was a breach of duty in failing to obtain the original certificate of title prior to settlement. Further, it seems to me that there was no acquiescence by the defendant in conducting the trial on the basis of that un-pleaded assertion. That is made clear by the fact that Mr Rosier was not asked to comment on the proposition that it was part of the defendant's duty to obtain the certificate of title or, in the circumstances of this case, a breach of the defendant's duty not to obtain the certificate of title. The unfairness is made transparent by the fact that the plaintiff in its submission has been critical of Mr Rosier and used his failure to comment on the issue as a reason to prefer Mr Barakate's evidence over his.

[95] In the end result I accept Mr Rosier's evidence over that of Mr Barakate. The reason I do so is that Mr Barakate, in his report, made much of the fact that there

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[90] (1990) 169 CLR 279, at 286-287.

had been no contact with Worthington and no search of the Law Society website. However, when he was confronted with the incorrect factual basis he maintained that it made little difference. I accept the submission that nothing in the instructions to the defendant required the defendant to verify the identity of the borrowers. I am left with the impression that Mr Barakate relies on hindsight to suggest that other steps could have been taken by a reasonably competent solicitor. It may be that some of the matters mentioned might have caused an extremely cautious solicitor to be concerned, but that is not the relevant test.

[96] Accordingly I find that there was nothing in the documents or the signing of the documents which should have alerted Mr Schmidt or any reasonably competent solicitor that the transaction was "suspicious" so as to require him to advise the client of that fact.

Advice

[97] The cross-examination of Mr Schmidt proceeded on the basis that he ought to have advised the plaintiff that it should not continue with the loan to settlement, because only a registered mortgage could provide indefeasible security and a caveat would not provide the same level of security.

[98] The defendant argues that the case put during Mr Schmidt's cross-examination is not the plaintiff's pleaded case; the pleaded case is simply that the circumstances leading up to the conversation with Gilberthorpe should have alerted Mr Schmidt to the fact that the matters were suspicious. The plaintiff does not allege that the defendant breached any duty by failing to advise that the absence of an original Certificate of Title meant the plaintiff ought not to continue.

[99] I have found that Mr Schmidt did not advise the plaintiff that it should continue, or that it would be safe for the plaintiff to continue. In the circumstances of this case, where the plaintiff's expert and its two witnesses were not alerted to the pleading that the defendant had breached its duty by not advising that in the absence of the original certificate of title the plaintiff ought not to continue, the plaintiff ought to be confined to its case as pleaded.

[100] In any event, there is a real question as to whether it is part of a solicitor's duty to press his advice upon a client. In *Artahs Pty Ltd v Gall Standfield & Smith (a firm)*[91] Peter Lyons J, with whom McMurdo P and Fraser JA agreed on this point for the reasons as follows, stated:

> *[62] An Australian text identifies one of the obligations of a solicitor advising a client in a property transaction in the following terms:*
>
> > *"A solicitor has a duty to warn of the risks inherent in a transaction unless the client is already aware of the risks"*
>
> *…*
>
> *[68] It seems to me that, subject to the express terms of the retainer, the underlying principle relating to the obligation of a solicitor*

[91] [2013] 2 Qd R 202; [2012] QCA 272.

> *acting for a purchaser is, adapting the words of Doyle CJ, to take reasonable care to ensure that the client understands in a practical way the proposed contract, including its effect and potential consequences. Because the obligation is to take reasonable care, the specific advice required and the terms in which it is to be expressed will vary depending upon what the solicitor knows, or reasonably believes, of the client's relevant knowledge and experience. The obligation will often extend to drawing attention to risks inherent in the transaction. In general, a solicitor should advise the client… about ways by which the client might be protected from significant risks inherent in the transaction.* (footnotes omitted)

[101] Further, when a solicitor is acting for an experienced commercial client, the solicitor is not obliged to advise of risks which a reasonable person would assume the client was well aware.[92] I have come to the view that when Mr Schmidt rang Mr Dormer and Mr Flanders, he informed them of the position with Gilberthorpe and obtained authority to deal with Gilberthorpe. I accept his evidence that he did not give them advice that it was safe to proceed on the caveat in the absence of the Certificate of Title. I accept his evidence that he believed that they were experienced in the use of caveat security and that they were well aware of the risks involved in such security, and I accept that most of the work that he had done for the plaintiff involved caveat security.

[102] The pleaded case relies on the suspicion about the validity of the documents and proceeding without the Certificate of Title. I have found that the evidence does not support a finding that Mr Schmidt should have been suspicious. As to the fact that the matter proceeded on caveat security, neither he, nor a reasonably competent solicitor would be expected to have the hindsight to appreciate the emerging fraud by Gilberthorpe. The plaintiff has not proved the defendant breached its duty.

Inter Office Emails

[103] In relation to the alleged breach of duty, the plaintiff placed some importance on the contents of inter-office emails, in particular emails authored by Ms Belogiannis. Her opinions, expressed in the emails, were said to be illustrative of the approach taken by the defendant in respect of its conduct. Mr Schmidt gave evidence that he had a poor relationship with Ms Belogiannis which is apparent in the unprofessional and intemperate language contained in the emails. More importantly, I have no evidence as to how much Ms Belogiannis knew of the facts of the situation upon which to base her "opinions". I find the evidence of those emails to be unhelpful.

Who Suffered the Loss

[104] On all the documentary evidence, Owl was the lender. It was nominated as the lender on the loan documents, the money went directly from Owl to the defendant's trust account and thereon to the borrowers. It was Owl who sued for judgment in the District Court of New South Wales. There is nothing in the solicitor's letter of instruction from PSAL to say that it should be nominated as a co-lender. The loan documents went to Mr Flanders as evidenced by the email attaching the documents. No complaint was made at that time that the documents did not contain PSAL as co-

[92] *Vella v Permanent Mortgages Pty Ltd* [2008] NSWSC 505 at [504] per Young CJ.

lender. It is true that Mr Wilson gave evidence that the plaintiff was "required to repay the debt" and that it did repay the debt. I assume Mr Wilson was speaking morally rather than legally because there is nothing in any of the documentation which requires the plaintiff to repay the debt to Owl. Indeed, Mr Flanders almost conceded that the reason the debt was repaid was to keep the commercial relationship as it was.

[105] The affidavits supporting the recovery claim also nominate Owl as the lender.

[106] For these reasons I find that Owl was the lender and suffered the loss and that the plaintiff had no legal obligation to repay Owl. The plaintiff therefore did not suffer the loss claimed.

[107] The view I take is that the payment by the plaintiff to Owl was a voluntary act not caused by any breach of alleged duty by the defendant.

[108] In *Gould v Vaggelas*[93], a case of deceit which induced the purchase of a business, Gibbs CJ said:

> *There is no reason in principle why the defrauded purchaser should not recover damages for all the loss that flowed directly from the fraudulent inducement (unless, possibly, the loss was not foreseeable). If the purchaser, besides paying more for the business than it was worth, has suffered additional losses which resulted directly from the fraud he ought to be compensated for them. Of course, the court must be satisfied that the loss did result directly from the fraud and not from some supervening cause such as the folly, error or misfortune of the purchaser himself...*

[109] Dawson J said in the same case

> *Moreover, for a loss to be recoverable it must be clear that it is suffered as a direct consequence of the deceit and is not referable to something else such as the purchaser's ineptitude in the conduct of the business.*

As I have said, I consider that any "loss" was not caused by any alleged breach of duty and/or was too remote to be recovered. Proof of damage is an essential element in a claim for negligence. This element has not been proved.

Conclusion

[110] The plaintiff bears the onus of proof in this case and it has not discharged it.

[111] I order judgment for the defendant. The plaintiff is to pay the costs of an incidental to the trial to be assessed on the standard District Court scale.

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[93] (1985) 157 CLR 215.