Article Information

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Looks dubious – the third ground to restrain a lawyer from acting

***Strata Voting Pty Ltd (In Liq) v Axios IT Pty Ltd and Anor*[1] is a funded single plaintiff action. It involved a recent examination of the Court's power to prevent a lawyer from acting in proceedings for a conflict of interest. The authors represented Strata Voting in its successful defence of the restraint application.**

The Third Ground

Less frequently invoked than the first and second grounds (misuse of confidential information and breach of fiduciary duty), the third category upon which to restrain a lawyer in a position of conflict from acting in a matter is known as the "inherent jurisdiction" ground. The Court can restrain lawyers from acting in a particular case as an incident of its inherent jurisdiction over its officers and control of its processes.[2]

The jurisdiction is enlivened where there is an objective perception that a lawyer lacks independence such that the Court is compelled to interfere and remove the lawyer from acting in the matter. In other words, the position of the lawyer makes the Court *uneasy*.

The test for intervention is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice, including the appearance of justice, requires that a legal practitioner should be prevented from acting.[3]

Axios' failed application

The jurisdiction to enjoin a solicitor from acting is to be regarded as exceptional, and to be exercised by the court with caution. That was the basis on which his Honour Judge Dart of the South Australian Supreme Court dismissed the application brought to restrain Piper Alderman from acting for the liquidators.

Here, Piper Alderman are acting for the company in relation to a dispute which was in existence before the winding up commenced. The liquidator retained Piper Alderman to continue acting for the company for the purpose of the litigation, the subject of the existing dispute.

The supposed conflict was said to have arisen from a proof of debt which Piper Alderman lodged for about $47,000 in fees incurred prior to the administration. The argument was that Piper Alderman's impartiality was impaired by the fact that unless the litigation is successful, Piper Alderman will not be paid their outstanding fees because there will be no funds in the winding up to do so. Axios contended that "the conduct of the solicitor was so offensive to common notions of fairness and justice that they should, as officers of the Court, be restrained from acting".

However, his Honour considered the firm's status as creditor to be unremarkable. Even in a case where a substantial sum (over $830,000) was owed to lawyers by their insolvent client,[4] there was no risk to the proper administration of justice.

As everyone knows, solicitors routinely act in matters where they are owed money including conditional costs agreements, risk share arrangements, contingency fee arrangements and agreements that include uplift fees, to name a few.

The restraint application in *Strata Voting* was unsurprisingly and swiftly[5] dismissed with costs.

Conclusion

If an opposing party asserts that a lawyer should be restrained from acting for the opponent it is necessary for a clear case

to be made that the lawyer concerned is in a position where he is fixed with an interest of such a nature that he may fail in his overriding duty to the court. It requires proof of facts, and not mere speculation as to motive.

The risk to the due administration of justice has to be a real one. Otherwise, a litigant ought not be deprived of the lawyer of his choice.

Piper Alderman has nationally recognised lawyers with specialist expertise in litigation and legal matters. Please do not hesitate to contact us should you require legal advice.

[1] Unreported, Supreme Court of South Australia, Dart J, 23 January 2023 (**Strata Voting**).

[2] *Kallinicos & Anor v Hunt* [2005] NSWSC 118 at [76] (***Kallinicos***).

[3] Ibid.

[4] *Naczek & Dowler* [2011] FamCAFC 179, [84].

[5] In a 5-page judgment.