NORTON ROSE FULBRIGHT

Legal Opinion: Do Real Estate Lawyers in NSW Owe Their Clients a Duty of Care to Advise and Warn in Relation to Climate Risk?

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Contents

Executive summary

Question	Summary response
1. Do real estate lawyers in NSW owe a duty of care to advise their residential and commercial property clients about the risks and liabilities associated with climate change?	Yes, in many circumstances, a lawyer will have a duty of care to advise and warn their clients about climate risks. This duty is based on the tort of negligence and contract, as well as potentially the law of misleading or deceptive conduct, which is a statutory cause of action under the Australian Consumer Law (**ACL**), including sections 18 and 30 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth).
2. What practical steps could NSW lawyers take to discharge their professional duty in relation to climate change risk?	There are several steps that lawyers in NSW could take to discharge their professional duty in relation to climate risks including: • Warning their client of any obvious practical implications of climate change for the subject property and the proposed transaction. Such implications may include the risk that: – the property may be damaged by natural disasters with increasing regularity and/or severity; – the value, insurability, availability of finance and/or development potential of the subject property may be adversely affected; • Recommending to their client that they obtain further advice from relevant specialists (such as a valuer, planner, engineer or environmental consultant); and/or • If a report or tool were available analysing the risks which climate change presents to a particular property, recommending that their client obtain such as report and assist them to understand its implications. Another option potentially available to lawyers is to specifically exclude advising on climate change and the associated risks from the scope of their retainer. By doing so, the lawyer may effectively protect themselves from liability under the law of contract. However, breach of contract is **not** the only potentially available cause of action, and claims under negligence and the ACL may still succeed. In this regard, we note that whilst relevant to any claim made against a lawyer in negligence and

Question	Summary response
	under the ACL, the terms of the retainer are not necessarily determinative. Put another way, it is possible that a successful claim may still be made against a lawyer who fails to advise their client of the obvious implications of climate change, notwithstanding the fact that advising on such issues was excluded in their retainer.
3. If available, should NSW lawyers commission a report analysing how climate change is likely to impact a specific property to support residential and commercial property transactions?	Subject to instructions (including approval of the associated fee), yes. We consider that such a report would greatly assist lawyers involved in real estate transactions to fulfil their obligations and minimise the risk of claims.
4. What risks are NSW lawyers taking if they fail to discharge their duty of care?	Lawyers risk, amongst other things: • being liable to pay damages; • becoming embroiled in a costly and time consuming dispute; • being the subject of disciplinary action; and • reputational damage, increased insurance premiums and business losses.
5. When did the duty of care first arise?	Precisely when any duty of care on the part of real estate lawyers to advise and warn their clients of climate risks arose is factually dependent and will vary from case to case. However, we are of the view that many real estate lawyers are likely to be currently obliged to advise on climate risks, and were potentially obliged to do so as early as 2021.

Background

As the risks associated with climate change-related weather events such as flooding, bushfires and coastal erosion increase in frequency and severity, lawyers and conveyancers in NSW need to be equipped to recognise and advise on these risks and their impact on real property assets.

These risks take a number of forms, the most obvious of which are the **physical risks** to real estate assets caused by the damage resulting from 'natural' disasters.

However, climate change also brings with it a range of **transition risks**. Transition risks relate to changes in the behaviour of regulators, commercial institutions (such as banks and insurers) and the community due to climate change. Examples of transition risks include the following:

- development consent authorities may restrict the development potential of a parcel of land as they foresee or consider that it may be vulnerable to the physical risks of climate change; and
- insurers may cease to insure certain properties, or make the costs of doing so prohibitive, on the basis that the threats presented by climate change to that property are too high. In turn, the inability to obtain insurance may reduce the availability of mortgage finance, thereby rendering the property unsalable.

Whilst there is increasing awareness and information available in NSW in relation to the physical and transition risks associated with climate change, it is not presently common practice for real estate lawyers to advise or warn their clients of those risks. This is likely due to a combination of factors, including:

- the limited availability of clear guidance to the legal profession regarding the implications of climate risks and their relevance to conveyancing and other real estate transactions;[1]
- the limited availability and awareness of site specific information regarding how climate change may impact a particular property;
- the view incorrectly held by some lawyers that lawyers should give advice only about the law, and not its practical intersection with the financial and other objectives of their client; and
- the absence of specific case law regarding a real estate lawyer's duty to advise on the risks associated with climate change.

As a consequence of the above, large portions of the legal profession in NSW (and likely other professions) may be failing to adequately consider how climate risks should inform their day to day practices. This omission is increasing their exposure to **liability risks** - that is, the risk that clients and others will seek compensation from their professional advisors for the losses which they have suffered from the physical and transition risks of climate change.

In this regard, we note that the scope of a professional's duty of care to their client is not frozen in time. Rather, it is informed by what is reasonably foreseeable at any given point in time, which will evolve as the knowledge and understanding of climate change and its physical and transitional impacts grows and as tools which assess climate risk become available.

[1] Examples of the currently available guidance include that issued by the Law Council of Australia in December 2021, a copy of which is available here, together with the associated media release

1 Do real estate lawyers in NSW owe a duty of care to advise their residential and commercial property clients about the risks and liabilities associated with climate change?

1.1 Introduction to the source of the duty of care owed by lawyers in NSW

In NSW, lawyers owe a duty of care to their clients pursuant to the:

(1) terms of the contract entered into between the lawyer and their client; and

(2) the law of negligence.

In addition, lawyers are subject to the Australian Consumer Law (**ACL**), including sections 18 and 30 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth), which prohibits:

(1) engaging *"…in conduct that is misleading or deceptive, or is likely to mislead or deceive";* and

(2) the making of false of misleading statements regarding the "*characteristics of land*" and the "*uses to which land is capable of being put or may lawfully be put".*

As a consequence of the ACL, a lawyer must not make a false or misleading representation to their client (or any other person) in relation to land.

For completeness, we note that the circumstances in which liability for misleading or deceptive conduct may arise include where:

(1) a lawyer makes an inaccurate statement in relation to a property; and

(2) where a lawyer is silent as to a matter affecting a property, in circumstances which give rise to a reasonable expectation that the matter would have been disclosed.[2]

1.2 Interaction between the causes of action of breach of contract, negligence and misleading or deceptive conduct

Where a lawyer is being sued by a client, it is commonplace for all three causes of action mentioned above (breach of contract, negligence and misleading or deceptive conduct) to be pleaded.

In relation to the interaction between these three causes of action:

(1) the terms of the retainer will usually inform the Court's decision regarding the scope of the duty owed by the lawyer under the law of negligence.

(2) the terms of the retainer will also usually inform the Court's decision regarding whether the client had a reasonable expectation to be accurately informed by the lawyer of a certain matter.

(3) notwithstanding the above, the Courts (including the High Court of Australia) have been clear that a lawyer may well owe a duty of care to advise upon, disclose information in relation to, or warn of a matter which falls outside of, the scope of works specified in the retainer. The precise scope of a lawyer's duties will always be determined by reference to a "case by case" analysis which takes into account all of the relevant facts.[3]

1.3 Factors which have inclined Courts to find that a lawyer is obliged to warn a client of a risk associated with a transaction

The following factors have inclined the Courts to find that a lawyer is obliged to advise or warn their client as to a particular matter, regardless of whether it strictly falls within the scope of work specified in their retainer:

[2] See generally – *Vitek v Estate Homes Pty Ltd* [2010] NSWSC 237 and *Noor Al Houda Islamic College Pty Ltd v Bankstown Airport Ltd* (2005) 215 ALR 625.
[3] *Hawkins v Clayton* (1988) 164 CLR 539

(1) **The lawyer learns of information pertinent to their client's interests and/or the risks are obvious**

If, in the course of the execution of their scope of works, a lawyer learns of facts (or ought reasonably to have appreciated a fact)[4] which put them on notice that their client's interests are at risk, then the lawyer is obliged to bring the relevant risk to the client's attention and to advise of the need to obtain further advice, be it legal advice or other expert advice.[5] This obligation has been found to exist even if a relatively narrow scope of works is set out in the retainer.

In the NSW Court of Appeal case of *David v David,* the principle was articulated as follows:

"If, however, the solicitor during the execution of his or her retainer learns of facts which ***put him or her on notice that the client's interests are endangered or at risk unless further steps beyond the limits of the retainer are carried out****, depending on the circumstances, the solicitor* ***may be obliged to speak*** *in order to bring to the attention of the client the aspect of concern and to advise of the need for further advice either from the solicitor or from a third party".*[6]

By way of illustration as to how this principle has been applied in practice, the case of *Provident Capital Ltd v Papa,*[7] concerns the failure of a solicitor to warn his client of the obvious financial risks associated with taking on a mortgage over her own home, in circumstances where her ability to pay the loan was entirely dependent on the success of her son's gymnasium business, a fact which was known to the solicitor.

In this case, the NSW Court of Appeal found that the solicitor was negligent for failing to:

(a) warn his client of the risks of the transaction; and

(b) advise, in the strongest of terms, of the need to obtain independent financial advice.

In particular, the Court of Appeal stated:

"A solicitor's obligation is not simply to explain the legal effect of documents but to advise his or her client of the obvious practical implications of the client's entry into a transaction the subject of advice. *The prospect of the subject transaction wreaking havoc on Mrs Papa's life was glaring, given the by no means remote prospect that the business would be unable to support the loan repayments."*[8]

The recent NSW District Court decision of *Kumar v Sydney Western Realty Pty Ltd & Anor (No. 2)*[9] further illustrates the principle. In this case, the solicitor:

(a) was conducting a conveyance on behalf of the purchaser; and

(b) was aware that his client proposed to rent out a granny flat which formed part of the property;

(c) had received a copy of a Council notice stating that the granny flat was not approved for habitable use; and

(d) failed to advise their client of the implications of the above-mentioned notice for the client's proposed future use.

In finding that the solicitor had been negligent, the District Court emphasised that:

"Consideration should be given not only to the existence of any written retainer (present in this case), ***but also the other circumstances in which a client sought legal services*** *from the*

[4] *Heydon v NRMA Ltd* [2000] NSWCA 374 at [145]
[5] *David v David* [2009] NSWCA 8 at [74]
[6] [2009] NSWCA 8 at [76]
[7] [2013] NSWCA 36
[8] *Provident Capital Ltd v Papa* [2013] NSWCA 36 at [80]
[9] [2021] NSWDC 446

solicitor, and, very importantly, ***what the solicitor knows about the client's circumstances and objectives in entering into a transaction****".*

The abovementioned cases demonstrate that lawyers are unable to confine their services to the law, but must also advise on the real world consequences of their clients' proposed actions.

(2) **The lawyer professes to have specialised skills and expertise**

Where a lawyer professes to have a special skill in a particular area of the law, the standard of care required will be higher for that lawyer when compared to a non-specialist, and is to be judged against what could be reasonably expected of a practitioner with specialist skills.[10]

In the decision of *Yates Property Corporation (In Liq) v Boland,* the Federal Court of Australia Full Court articulated this principle as follows:

"When a client retains a firm that is or professes to be specially experienced in a discrete branch of the law ***that client is entitled to expect that the standard of care with which his retainer will be performed is consistent with the expertise that the firm has or professes to have****."*[11]

It follows from the above that a client who seeks advice from a lawyer who states that they specialise in a particular area, such as environment and planning law, can expect:

(a) to receive advice of a higher quality in relation to environment and planning law issues than that which a general practitioner could be expected to provide; and

(b) their lawyer to possess a greater level of foresight as to the environment and planning issues, including climate change, relevant to their interests.

(3) **The client does not have the capacity to protect their own interests**

The attributes of the client are taken into account when determining the scope of a lawyer's duty of care. In particular, the Court requires that the standard take into account the client's vulnerability, that is, the client's capacity to take steps to protect itself by reason of ignorance, access to information, social or economic constraints.

In the case of *Carradine Properties Ltd v D J Freeman & Co*, this principle was framed as follows:

". . . the precise scope of that duty will depend inter alia upon the extent to which the client appears to need advice. An inexperienced client will need and be entitled to expect a solicitor to take a ***much broader view of the scope of his retainer and his duties than will be the case with an experienced client"****.*[12]

Therefore, if a client has limited experience or lacks knowledge, it is the duty of a lawyer to adapt, and meet the needs of each individual. It follows that a lawyer's obligation to "*be vigilant for their clients' interests*" will be greater when their client is relatively unsophisticated.[13] In such cases, it may be necessary for a lawyer to "…***step in front*** *of their client. They* ***must provide advice to them against the follies of plans*** *having a legal character, the full legal ramifications of which the client may not understand*."[14]

1.4 Possible implications of section 5O of the *Civil Liability Act 2002* (NSW) (CL Act)

A lawyer may attempt to defend a claim made against them on the basis of section 5O of the *Civil Liability Act 2002* (NSW), which reads as follows:

[10] *Rogers v Whitaker* (1992) 175 CLR 479 at 487
[11] (1998) 85 FCR 84 at [105]
[12] (1982) 126 SJ 157
[13] *Cousins v Cousins* [1991] ANZ Conv R 245 at p 248
[14] *Cousins v Cousins* [1991] ANZ Conv R 245 at p 248

5O Standard of care for professionals

*(1) A person practising a profession (a professional) **does not** incur a liability in negligence[15] arising from the provision of a professional service **if it is established that the professional acted in a manner that** (at the time the service was provided) was **widely accepted in Australia by peer professional opinion as competent professional practice.***

*(2) However, peer professional opinion cannot be relied on for the purposes of this section **if the court considers that the opinion is irrational.***

*(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter **does not prevent** any one or more (or all) of those opinions being relied on for the purposes of this section.*

*(4) Peer professional opinion **does not have to be universally** accepted to be considered widely accepted.*

[Emphasis added]

In relation to the application of this defence, we note the following:

(1) the onus of establishing the defence provided by section 5O of the CL Act will be on the defendant/lawyer;

(2) section 5O of the CL Act is most commonly used by the medical profession, and especially surgeons, who are often able to point to accepted methods of performing a particular procedure, which have developed over time, are based on evidence and endorsed (and taught) by professional bodies; and

(3) section 5O of the CL Act is rarely successfully relied upon by a lawyer. In our experience, and based on a review of the available case law, this is because it is difficult for a lawyer to establish that there is a relevant "widely accepted practice" amongst peer professionals. This is likely because lawyers are always required to tailor their advice and services to the facts, as well as their client's objectives and circumstances. As such, there is often no widely accepted practice to which the lawyer can refer; and

(4) for lawyers, section 5O of the CL Act appears to be most relevant to matters of process and the sequencing of steps. For example, whether they conducted proceedings in a manner which was widely accepted as competent, as opposed to whether the substance of the advice provided to a client was complete or accurate.

Accordingly, whilst a lawyer may seek to rely on section 5O of the CL Act to defend a claim made against them for failing to advise on climate risks, we foresee that any such lawyer would experience difficulties making out this defence in the course of defending a claim that they failed to adequately advise or warn their client of climate risks.

1.5 Conclusion regarding whether real estate lawyers in NSW owe a duty of care to advise their residential and commercial property clients about climate risks?

There has not (as yet) been judicial consideration of the extent to which a lawyer must advise on or warn their clients of the physical and other risks associated with climate change.

Notwithstanding this, it is a natural extension of the principles discussed in sections 1.1 to 1.3 above that, in many circumstances, a lawyer will have a duty of care to advise their clients about climate risks.

This is especially likely to be the case where one or more of the following facts are true:

[15] 'negligence' is not a reference to the tort of negligence, but to a category of conduct which may be an element in a cause of action brought in tort, or contract, under statute or otherwise

(1) **It is obvious or well known that climate risks affect the property.**

As discussed above, including at section 1.3(1), a lawyer is obliged to warn their clients of the obvious risks associated with a transaction.

Including as a consequence of significant media coverage and recent natural disasters, it is common knowledge (or obvious) that certain areas in NSW are significantly impacted by climate change, and that as a consequence the development potential, insurability and value of these properties have been adversely affected. Examples of such areas include, but are by no means limited to, coastal areas and other areas known to prone to natural disasters, such as Lismore, Richmond, Page and the Northern Beaches.

Accordingly, we are of the view that it would be open to a Court to find that, where a client is purchasing a property in an area notoriously impacted by climate change, climate risks are "obvious risks" of which a lawyer is obliged to warn their client.

(2) **The lawyer is aware that climate risks may affect their client's interests.**

As discussed above, including at section 1.3(1), what the lawyer knows about a client's objectives will inform the scope of their duty of care.

It follows that, if the lawyer is aware that their client is purchasing a property with the intention of developing that property, it is likely to be incumbent on the lawyer to:

(a) warn their client that their ability to lawfully carry out their proposed development may be adversely affected by climate change, particularly if the property is in a bushfire prone area, flood prone area or area affected by coast erosion.; and

(b) advise their client that they should seek further advice before proceeding with the purchase, including in relation to the current development potential of the property.

(3) **The lawyer professes to be a specialist in environmental law**.

As discussed above, including in section 1.3(2), if a solicitor professes to have expertise in environmental law, then their clients can expect that lawyer to have a greater level of knowledge regarding how climate risks may affect their interests, and to share that knowledge with them.

Accordingly, a Court will more readily find that lawyers who hold themselves out as specialists to have an obligation to advise their clients on climate risks.

(4) **The client is vulnerable.**

As discussed above, including in section 1.3(3), the Courts have considered clients who are inexperienced in property transactions, who lack the capacity to seek additional advice or ask pertinent questions to be vulnerable. Lawyers advising such clients need to be especially cautious and may well be obliged to spell out for their clients, matters which are obvious to others (such as that climate change will impact the value of their property).

This view is supported by the following statement of Chief Judge Brian Preston of the NSW Land and Environment Court:

"Providing clients with sound advice to solve a legal problem or dispute requires addressing not merely the legal issues but also the financial, the emotional and psychological, the relational and social, the environmental, and the ethical consequences of different courses of action. Clients can thereby understand the consequences, costs and uncertainties associated with alternative courses of action and make an informed choice. This holistic advice is given by lawyers to clients in many areas of the law on a daily basis. ***Adding the climate change consequences as a consideration is a natural extension of this everyday practice."*** [emphasis added]

Practically speaking, in the absence of readily accessible and meaningful information regarding how climate risks impact a particular property, the nature of the advice which lawyers are able to provide will

be general in nature, and likely to involve referring their clients to other experts. Given the timing imperatives typically associated with property transactions, this is far from ideal.

However, if a report or tool was available analysing the risks which climate change presents to a particular property, lawyers will be in a position to provide more meaningful and timely advice to their clients.

1.6 The obligations of vendors and their lawyers

As noted in section 1.1(1) above, lawyers are obliged to ensure that they do not make misleading or deceptive representations, including in respect of property.

In addition to being applicable to lawyers acting for those acquiring an interest in land (such as purchasers and mortgagees), it is also relevant to lawyers acting for and representing vendors. In this regard, we note that lawyers are sometimes instructed to prepare due diligence materials on behalf of vendors, which are in turn provided to potential purchasers. If these materials contain a factually incorrect statement or omit pertinent information regarding the impacts of climate change on a property, it is foreseeable that the vendor and/or their lawyer may face a claim of misleading or deceptive conduct by the purchaser.

We consider this to be a natural extension of the existing case law regarding misleading or deceptive statements made by or on behalf of vendors in property transaction, including the cases of:

(1) *Pratt & ors v Latta*[16], in which representatives of the vendors (namely, their real estate agents) made inaccurate and incomplete verbal and written statements in relation to a parcel of land, including in relation to its size. Notwithstanding the fact that these inaccurate statements were "innocently made", they were nevertheless held to be misleading and therefore in breach of what is now known as the ACL;

(2) *PPK Willoughby Pty Ltd v Baird*[17], in which it was accepted that a solicitor made a negligent misstatement when erroneously saying that a property was not affected by flood controls; and

(3) *Noor Al Houda Islamic College Pty Limited v Bankstown Airport Limited,*[18]in which the owner of a property proposed to be leased to the plaintiff was found, due to their representative failure to disclose contamination, to have engaged in misleading or deceptive conduct.

It follows that the liability risks of a lawyer preparing such a report on behalf of a vendor will be materially reduced if they are able to obtain and disclose a product, tool or report, which assesses climate risk.

1.7 Relevant views of the Australian Government Productivity Commission

The Productivity Commission (which provides independent advice to the Commonwealth government) has recommended that "*pre-sale disclosure of climate risks for all residential and commercial property sales*" should be mandated.[19] In particular, in its report entitled "5-*year Productivity Inquiry: Advancing Prosperity*", the Productivity Commission states that:

> *Mandatory disclosure of the climate-related risks facing a property — such as the likelihood of coastal inundation, riverine flooding, subsidence, destructive winds, bushfire and other natural disasters —* ***would help potential buyers of a property make more informed decisions…****However, the risk of* ***subsequent reductions in the values of particularly climate-exposed properties*** *might preclude voluntary disclosure by existing owners, and* ***a general lack of awareness may prevent potential buyers from seeking it…****.*"[20]

[16] [2001] FMCA 84
[17] [2020] NSWSC 1757
[18] (2005) 215 ALR 625
[19] Australian Federal Government, 'Prosperity Report' (2023) Vol 6, pg. 9 (Volume 6 - 5-year Productivity Inquiry: Managing the climate transition (pc.gov.au))
[20] Australian Federal Government, 'Prosperity Report' (2023) Vol 6, pg. 5 (Volume 6 - 5-year Productivity Inquiry: Managing the climate transition (pc.gov.au))

Whilst the recommendations of the Productivity Commission are not (at least currently) reflected in legislation, its report confirms that:

(1) information regarding how climate change is likely to impact a property is pertinent to the decision of purchasers; and

(2) purchasers should be made aware of the currently available information regarding such impacts.

Even in the absence of the legislative changes proposed by the Productivity Commission, the abovementioned views are consistent with the opinion expressed in this advice, being that, in many circumstances, a lawyer acting in a conveyance will have a duty of care to advise their clients about climate risks.

2 What practical steps could NSW lawyers take to discharge their professional duty?

2.1 If a NSW lawyer possesses specific information regarding how climate change may impact a property being purchased by their client, what is the obligation on the lawyer to interpret that information?

If, in the context of a potential conveyance (such as during the course of conducting standard searches or otherwise), a lawyer received a report which predicted how climate change was likely to impact the subject property, the lawyer would clearly be under a duty to pass on that report to their client.

Regarding the extent to which a lawyer is required to go further and provide advice on the implications of the report for their client, there are two competing considerations, which are as follows:

(1) lawyers should not be compelled to provide opinions which they are not qualified to give, including in relation to the financial wisdom of a transaction;[21] and

(2) it is incumbent on a lawyer to advise their client of the obvious practical implications of the client's entry into the transaction that is the subject of advice.

The Courts typically reconcile these two considerations by allowing lawyers to discharge their duty of care by bringing the potential issue to their client's attention and simply recommending that they seek further advice from a specialist lawyer and/or other expert.

In *Hatzitanos & Ors v Jordan*[22] the Court agreed with the evidence of an expert that, whilst it was not necessary for a lawyer (who did not profess to have any specialised skills in the areas of planning or environmental law) to advise on the development potential of a parcel of land, it would be reasonable and appropriate to require a lawyer to advise their clients to seek advice about that potential. In particular, the Court stated:

"*Whilst it would, in my opinion, be altogether too onerous to impose a duty on solicitors to warn of every theoretical possibility that may affect a proposed plan, it would be appropriate to require a solicitor to inform the would-be purchaser (who was not known to be experienced in these matters)* ***of the general risk and to suggest he or she seek the advice*** *of an architect, town planner, or the Council*"[23]

In some circumstances, a lawyer's obligation to recommend that their client seek further advice can be significant, depending on the obvious practical consequences and risks associated with the transaction. For example, in *Provident Capital Ltd v Papa*[24] (discussed in section 1.1 above), the Court opined:

"*It may be apparent, as it was here, that the legal and practical consequences to a client of entering into a transaction may be significant, but are not such as can be assessed without financial or further financial information or advice. In such circumstances, the* ***solicitor may be obliged to counsel in appropriate terms (perhaps strong terms) about the risks in proceeding without further information or advice****.*"

In light of the above, we consider that, if a lawyer is able to obtain a report which assesses how climate change is likely to impact the subject property, it may not be necessary for that lawyer to summarise the findings of report, particularly if it:

(1) is already in a digestible form and written in plain English; and

(2) discusses how climate change may impact the value, insurability, availability of finance and development potential of the subject property, and the kinds of further advice which it may be useful to obtain in relation to those impacts.

[21] *Citicorp Australia Ltd v O'Brien* (1996) 40 NSWLR 398 at 418
[22] [2005] NSWSC 763
[23] [2005] NSWSC 763 at [47]
[24] [2013] NSWCA 36

That said, if the report indicate that the subject property is at a relatively high risk of being impacted by climate change, it may be necessary for a lawyer to recommend, in strong terms, that their client seek further advice.

Of course, if a lawyer, after having read a report/analysis of how climate change is likely to impact the subject property, is able to meaningfully comment on the practical implications of climate change for individual property owners, we see no reason why they should not do so. Such a practice is commonplace in relation to other issues affecting property. For example, in the field of contaminated land, it is common practice for lawyers with experience in that area to (after receiving relevant technical reports) advise their clients of the options for addressing/mitigating the liabilities associated with contamination, such as insurance, remediation works, environmental management plans and contractual warranties and indemnities.

As lawyers become increasingly familiar with how climate risks impact their clients' interests and the options for addressing those impacts, a similar practice of advising on the implications of, and potential solutions to, climate risks may develop amongst specialists, and there is little doubt that this would be of significant value to conveyancing clients.

2.2 Is a lawyer able to explicitly exclude advising on climate risks from their retainer?

Yes.

However due to the significance of such an exclusion in a retainer concerning the purchasing of property in the current climate change-affected world, this exclusion must be explicit and comprehensive. In addition, the enforceability of the exclusion will be assisted if it is drawn specifically to the attention of the prospective client.

Further, as the awareness of the impacts of climate change increases, we expect that it will become more difficult for lawyers to justify excluding climate risk advice from their retainers. In particular, we can foresee that such an exclusion may prompt potential clients to ask questions as to why such an exclusion is reasonable/necessary and potentially seek alternative legal advice.

In addition, whilst such an exclusion may protect a lawyer from contract law claims, it will not necessarily be effective against a claim against a solicitor in negligence, if such an exclusion is unreasonable in the circumstances.

The Australian High Court has held that "*in certain circumstances, the tortious duty owed to a client might extend beyond the parameters of the retainer and require a solicitor to take positive steps to avoid a client sustaining any real and foreseeable economic loss*".[25]This is referred to as the penumbral duty of care. In recent years, the penumbral duty has been the subject of considerable debate and held not to exist in certain circumstances, namely, where the client is sophisticated and knowledgeable.[26] In circumstances where a client is unsophisticated or vulnerable, the penumbral duty of care has still been applied.[27]

Generally, the extent to which an explicit exclusion clause in a retainer will effectively limit a lawyer's duty to advise their clients will depend on several factors, including, but not limited to:

(1) the terms of the retainer - the Courts are generally disinclined to construe an ambiguous retainer clause, including an exclusion clause, for the lawyer's benefit, particularly in instances where a client is vulnerable and did not have the terms of the retainer explained to them in sufficient detail or with sufficient guidance.[28]

(2) the nature of the client - as discussed above at paragraph 1.3 the experience of the client is significant in determining whether they are aware of the implications of the retainer. An inexperienced client may not understand the implications of exclusions from the retainer. Specifically, if a client is financially illiterate or vulnerable, a lawyer's duty may extend to

[25] *Hawkes v Clayton* (1988) 164 CLR 539
[26] *Australian Executor Trustees (SA) Limited v Kerr* [2021] NSWCA 5
[27] *Provident Capital Ltd v Papa* [2013] NSWCA 36; BC201300843 [79]
[28] *Swain Mason v Mills & Reeve (a firm)* [2012] WTLR 1827; [2012] EWCA Civ 498

advising as to the financial drawbacks of a transaction, even if they are not explicitly retained for this purpose.

(3) the circumstances within which the advice is given - in almost every circumstance, the court acknowledges, "*when a lay client instructs a lawyer to perform specialist legal services involving the exercise of professional skill, this attracts a duty…on the lawyer to give any advice reasonably necessary to protect the client's interests whether or not expressly requested"*.[29]Whilst this duty has been limited in recent years, it is still generally held to apply to vulnerable clients.

In addition, a lawyer seeking to exclude advising on climate change from the scope of their services should still be cognisant of their obligations under the ACL. In this regard, we note the following:

(1) the terms of that retainer (including any relevant exclusion) **will** be relevant to whether it is reasonable for the client to expect to be accurately informed by the lawyer of a certain matter;

(2) the terms of the retainer **will not** necessarily be relevant, or known, to all persons receiving copies of advices and other documents prepared by the lawyer. As such, the terms of the retainer will not be capable of limiting liability under the ACL in all circumstances.

By way of example, in the case of *PPK Willoughby Pty Ltd v Baird*[30] a leading Sydney law firm, whilst denying that it was negligent, admitted that a due diligence report prepared by it was misleading and deceptive, notwithstanding the fact that on its version of events it was instructed not to obtain an updated "planning certificate".[31] In this regard, we understand from the decisions of the NSW Supreme Court and the Court of Appeal that, as a consequence of the due diligence report being prepared on the basis of an outdated certificate, it failed to comment upon the flood control restrictions affecting the subject land, and was therefore misleading.

Had the plaintiff been able to establish that it had in fact suffered an "overall loss" because of the transaction, then the law firm may well have been liable to pay damages to the plaintiff for its misleading due diligence report, even if it was not found to be liable under contract or tort law.

[29] Scope of Lawyers' Duty of Care in Tort', *Halsbury's Law of Australia* (2018), page 250-1335
[30] [2020] NSWSC 1757 and [2021] NSWCA 312 – Note, this case was ultimately determined in favour of the law firm on the basis that an overall loss was not suffered
[31] A planning certificate was previously known as a "Section 149 Certificate", and is issued by the local council pursuant to section 10.7 of the *Environmental Planning and Assessment Act 1979*

3 Where available, should NSW lawyers commission a site specific environmental report / search containing climate data analysis to support property transactions

Yes.

We consider that such a report would greatly assist lawyers involved in real estate transactions in NSW to fulfil their obligations (under contract, negligence and the law of misleading or deceptive conduct) and minimise the risk of claims.

Such data would assist lawyers to:

(1) adapt their practices so that they take climate risks into account in a way which is meaningful and of direct relevance to their clients;

(2) protect their clients from the inevitable financial implications of climate change;

(3) identify when they need to warn their clients of climate risks, and recommend that they receive further advice; and

(4) ensure that any reports they provide to their clients or third parties are accurate and not misleading or deceptive.

4 What risks are NSW lawyers taking if they fail to discharge their duty of care regarding advising on climate change risks?

4.1 Liability for damages

As outlined in response to question 1, a lawyer's duty of care arises under the law of contract, tort and misleading or deceptive conduct.

If a client or other third party (the **plaintiff**) successfully establishes one or more of these causes of action against a lawyer, then the lawyer is likely to be liable to pay the plaintiff damages for resulting loss.

The basis on which damages will be calculated will vary from case to case. By way of general guide only, the damages for which the lawyer may be liable include:

(1) the costs incurred by the plaintiff in the course of purchasing the property (minus any revenue received from the sale of the property or the residual value of the property if it continues to be owned by the plaintiff);

(2) compensation for the reduction in value of the property as a consequence of climate change;

(3) the costs wasted by the plaintiff in the course of pursuing development applications which were futile as a consequence of climate change;

(4) compensation for any additional expenses incurred, and which will be incurred *in the future*, as a consequence of climate change. Such expenses could foreseeably include, amongst other things:

(a) additional insurance costs;

(b) additional repair and maintenance costs to rectify flood, bushfire or other types of property damage;

(c) relocation costs;

(d) rebuilding costs; and

(e) the costs incurred by the plaintiff in the course of suing the lawyer.

In addition, the defendant lawyer will be required to expend considerable amounts of time and effort and be liable to pay their own legal (and potentially expert) costs[32] in the course of handling and responding to the plaintiff's claims against them. They may also incur increases in their premiums for professional indemnity insurance as a result of such claims being brought against them.

4.2 Disciplinary action

A lawyer's conduct in NSW is governed by the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (**Conduct Rules**). Specifically, lawyers "*must provide clear and timely advice to assist a client to understand relevant legal issues and to make **informed choices** about action to be taken during the course of a matter, consistent with the terms of the engagement"* [emphasis added].[33]

If a lawyer fails to discharge their duty of care, the Office of the NSW Legal Services Commissioner (**OLSC**) can pursue any breach by a lawyer under the Conduct Rules.

If the OLSC finds a lawyer has engaged in unsatisfactory professional conduct, for example by failing to properly advise their client of a relevant risk, the OLSC may, amongst other things:

(1) caution the lawyer;

(2) reprimand the lawyer;

[32] Subject to the terms of their insurance
[33] *Legal Profession Uniform Law Australian Solicitors" Conduct Rules* 2015 (NSW) section 71

(3) order the lawyer to redo the work at no cost or waive or reduce fees for the work; and

(4) fine the lawyer up to $25,000.[34]

Alternatively, the OLSC may initiate and prosecute disciplinary proceedings against a lawyer in the Occupational Division of the NSW Civil and Administrative Tribunal.[35]

4.3 Reputational damage

Lawyers who fail to discharge their duty of care may also suffer considerable reputational damage and business losses, including as a result of the following:

(1) publication of the judicial decision where the lawyer was found to be negligent, breached their contractual obligations and/or engaged in misleading or deceptive conduct. Any such decision will be publicly accessible and, depending on the severity of the lawyer's conduct, may result in additional publication online or in newspapers;

(2) an increase in the lawyer's professional indemnity insurance premiums;

(3) an inability to tender for certain work. Certain clients, and in particular, government clients, may refuse to accept tenders from practitioners or law firms where key personnel have been found to have engaged in negligent or other forms of unprofessional conduct; and

(4) current and potential future clients deciding to cease to engage the services of the lawyer.

[34] *Legal Profession Uniform Law 2014* (NSW) section 299(1)(a)(f)
[35] *Legal Profession Uniform Law 2014* (NSW) section 300(1)(a)

5 When did the real estate lawyer/conveyancer's climate duty of care first arise?

It is difficult to pinpoint when this duty first arose, as it is a duty which is still evolving and its scope and extent will continue to broaden as knowledge and acceptance of climate change impacts becomes part of common legal parlance.

It is clear that there has long been an obligation to advise on a range of hazards which can affect or restrict the development or use of a property (such as being located within a flood planning area or being bushfire prone), so the lawyer's duty to advise on physical impacts to a property is not new.

What is, of course, relatively new is the obligation to advise on these hazards through the lens of climate change. This arguably adds further obligations to advise that:

(1) these impacts are likely to increase in severity and frequency, thereby exacerbating the potential physical effects on a property; and

(2) will bring with them the associated transition risks of increased cost (or non-availability) of insurance and financing and/or curtailing of the range of uses to which a property may be put.

In the NSW context, it is arguable that the duty arose when "natural" disasters first started being widely attributed (by the media, government and the public) to climate change. This is probably sometime in 2021 or 2022.[36]

Of course, there were several bushfire and drought events before 2022, which with the benefit of hindsight were probably linked to climate change, but were at the time seen as unfortunate and significant, but nonetheless still, "natural" disasters.

Once a report analysing climate change risks for specific properties becomes readily available and regularly used by the legal/conveyancing profession, the existence of a duty of care to at least raise with a client potential implications of climate change for their proposed transaction will be beyond question.

[36] https://www.climatecouncil.org.au/resources/the-great-deluge-australias-new-era-of-unnatural-disasters/

Conclusion

Lawyers in NSW owe a duty to their clients to warn them of risks associated with a property transaction, including any physical risks to the property which they are purchasing. The scope and breadth of this duty is not static, and will continue to evolve as new and changing risks emerge.

One of these emerging risks is climate change. It is now clear that this phenomenon presents both physical risks to a property through damage caused by severe and frequent weather events, and associated transition risks in the form of increasing costs or non-availability of insurance and/or finance.

These risks are only likely to increase.

Until now, it has been difficult to identify exactly what form any advice or warning which a lawyer could give to their client could or should take. There has been limited (or no) data or analysis available which would enable anything other than a vague and generalised warning to be provided.

However, if a report or tool were to become available which provided meaningful data and analysis of climate change impacts on a specific property, then lawyers would be in a position to provide their clients with a meaningful assessment of the level of risk to the asset being acquired.

Once such a report becomes readily available, particularly if it forms part of the suite of searches which can be ordered as a normal part of a conveyancing transaction, a lawyer who fails to order such a report (or at least seek instructions to do so), would be at risk of failing to discharge the duty of care which they owe to their client.