

Insurance Insights

Help, my employer is suing me for negligence!

[*Beri Distributors Pty Ltd v Mossensons Pty Ltd* \[2022\] WADC 30](#)

Key takeaways

- **Professionals are liable to repay fees to their clients in full where the work is of no value at all to the client.**
- **Employers are unlikely to be able to recover lost fees from their employees particularly where there is a duty to supervise the employee or the employer knows of the facts giving rise to the employee's negligence.**

Background

Beri Distributors Pty Ltd and one of its directors (**Clients**) instructed Mossensons (**Solicitors**) to act on their behalf in three separate debt recovery actions commenced in the District Court of Western Australia. The Solicitors' conduct of these actions did not go smoothly and resulted in an order for the Clients to pay the costs of the debt recovery defendants on an indemnity basis.

The Clients then commenced proceedings against the Solicitors to recover, in the first instance, the indemnity costs they had paid to the debt recovery defendants. The Solicitors agreed to reimburse the indemnity costs to the Clients, but the Clients retained the right to pursue, and ultimately pursued, recovery of all legal costs paid by them to the Solicitors for the debt recovery actions (approximately \$290,000).

The Clients alleged they did not receive any benefit at all from the legal services provided by the Solicitors, who had been negligent.

The Solicitors accepted that they owed an implied contractual obligation and a duty of care to exercise reasonable skill, care and diligence in the provision of their legal services, but denied liability.

The Solicitors then commenced third party proceedings against their employed solicitor (**Employee**), asserting that in the event the Solicitors were negligent, the Employee was also negligent in the discharge of his duties to the Solicitors in the course of performing legal work for the Clients.

Specifically, it was alleged that the Employee had breached the duty he owed to the Solicitors¹ by negligently:

¹ *Beri Distributors Pty Ltd v Mossensons Pty Ltd* [2022] WADC 30 at 288

- conducting proceedings and drafting pleadings which were not tenable given the underlying facts and/or were inconsistent with associated proceedings, and
- commencing appeal proceedings in circumstances where the underlying actions were improper and negligently commenced.

Decision

Primary action

The Court found that the Solicitors were obliged, independently of any instructions they received from the Clients, to make a proper investigation into the existence of a cause of action and the major deficiencies or obstacles in the case². The Solicitors were negligent by prematurely commencing two sets of proceedings³ when no cause of action had accrued in circumstances where:

- a contractual obligation to repay money (between the debt recovery defendants and the Clients) had not been triggered⁴
- no other basis for earlier repayment could be established⁵
- the Solicitors had researched and discarded potential other means for establishing a cause of action and commenced the debt recovery actions anyway⁶, and
- the Solicitors relied upon the implication of contractual terms, which the Court found to be unarguable.⁷

Following on from the above, where proceedings are negligently commenced and doomed to fail the measure of damages is the whole of the fees incurred by the Clients.⁸ The Court found there was no benefit to the Clients of the debt recovery proceedings.⁹ The Solicitors had mishandled the Clients' matters and while new solicitors instructed by the Clients had received the (original) Solicitors' work product, they could not have any confidence in the work previously done and so had to start again.¹⁰ The Clients were therefore entitled to recover all legal fees paid by them to the Solicitors.

Third Party action

The third party action was primarily dismissed because:

- the Solicitors failed to show the Employee acted with minimal supervision. The Employee's work on the matter was obliged to be and was supervised by a director of the Solicitors¹¹

² At [113].

³ The Solicitors were also found to be negligent in commencing a third set of associated proceedings, but the focus of this case summary is on the premature commencement of the main debt recovery proceedings.

⁴ At [95] and [106].

⁵ At [96].

⁶ At [113].

⁷ At [113].

⁸ At [85] and [256].

⁹ Reasons set out in detail at [259] - [275].

¹⁰ At [281].

¹¹ At [293] - [296].

- the Solicitors should have identified any failings in work done by the Employee as part of their promise to the Clients (in the Solicitors' retainer agreement) to supervise their employees
- the Solicitors knew about the defects in the pleadings in the debt recovery actions commenced on behalf of the Clients¹²
- the Employee did not make the decision to commence the doomed proceedings
- a solicitor is not entitled to charge for its fees if it has been negligent and the work negligently done does not give a benefit to a client. If a contribution was obtained from the Employee, the Solicitors would have received more than they were ever entitled to and so would be unjustly enriched.¹³

As a result of these findings, the Solicitors were not simply liable to the Clients by reason of their vicarious liability for the actions of the Employee. They were negligent independent of the Employee, and could not claim from the Employee a right to a complete indemnity arising out of a breach of the term implied into the Employee's employment contract (to act with due care and skill in performing work for clients).

Implications

This is a cautionary tale for professionals including legal practitioners in relation to all aspects of their practice, whether it be in carrying out work for clients or supervising others in the carrying out of that work. This case is notable through the commencement of a third party action by an employer against an employee. The dismissal of the third party action indicates that such an action is unlikely to be successful unless an employer can prove it did not have and was not required to have any involvement in, or oversight of, the employee's actions. This is likely to be a difficult hurdle to overcome for most employers.

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¹² At [297].

¹³ At [316].