The song remains the same – another important case about solicitors' file notes

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The importance of file notes is an oft repeated refrain in the offices of Law Claims. An interesting and recent NSW case - *Lemongrove Services Pty Ltd v Rilroll Pty Ltd [2019] NSWCA 174* - again demonstrates the critical importance of making good and detailed file notes so that you can protect yourself in the event of a claim.

Anthony Brischetto, a solicitor in a NSW firm, acted for Mr & Mrs Hanshaw in relation to the purchase of land at Huntleys Cove on the Parramatta River and a café business conducted on that land. The Hanshaws wished to purchase the land and business, however wanted to have included in the Contract for Sale, which Mr Brischetto was negotiating on their behalf, a *"subject to finance"* clause.

On 19 November, 2014, Mr Brischetto wrote to the Vendors seeking that such a clause be included. The following day, the solicitors for the Vendors wrote back to Mr Brischetto saying that their clients would **not** agree to making the contract *"subject to finance"* and would **not** insert the requested clause into the contract. Mr Brischetto met with the Hanshaws on 27 November, 2014 and the contracts were later exchanged without the inclusion of any *"subject to finance"* clause.

Mr & Mrs Hanshaw were unable to obtain the necessary finance and were unable to complete the purchase. They were sued by the Vendors and agreed to pay the Vendors' damages which were ultimately agreed at some $272,000. The Hanshaws cross-claimed against their solicitors alleging that Mr Brischetto was in breach of retainer and duty in that he had not told them that the Vendors had not agreed to include the *"subject to finance"* clause in the contract. They alleged that, had they known that, they would not have exchanged contracts. Mr Brischetto denied that there had been a breach and said that he had told the Hanshaws at their meeting on 27 November, 2015 that the Vendors had not agreed to include the relevant clause.

The case therefore came down to a narrow question of fact – did Mr Brischetto on 27 November, 2014 tell the Hanshaws about the Vendors' refusal to include the clause, or did he not?

Mr Brischetto's case was that his oral evidence that he had told the Hanshaws about the Vendors' position on 27 November, 2014 was corroborated by his detailed handwritten notes. It was said that these notes confirmed that he went through the Contract in detail with his clients.

The Trial Judge and the Court of Appeal examined in detail the evidence given by Mr Brischetto, Mr & Mrs Hanshaw and Mr Brischetto's file note as to what occurred on the 27 November, 2014. The evidence of the Hanshaws was, in effect, that they had no recollection of ever being told that the *"subject to finance"* clause had not been agreed and that, given the obvious importance of that clause to them, this was something that they would have remembered. They also said that in the absence of being explicitly told that the clause had not been agreed they assumed that it had been agreed.

Mr Brischetto's notes (made shortly after the meeting) record that:

> *"Loan with NAB – Val wouldn't be done until after exchange – will lend 70% of Val – John [Mr Hanshaw] is okay with this – can put in more if Val is short"*

His submission was that this note confirmed that he had raised the absence of the *"subject to finance"* clause with the Hanshaws before they signed the contract because it was implicit in the statement that the Hanshaws could make up a shortfall that they knew the contracts were not *"subject to finance"*.

One of the key factors in the reasoning of all Judges in rejecting Mr Brischetto's defence was that nowhere in Mr Brischetto's file (either in correspondence or in file notes) was there an unequivocal statement advising the Hanshaws that the *"subject to finance"* clause was not included in the Contract. Critically the Court of Appeal (Payne JA, with whom Bell P and Simpson AJA agreed) held as follows:

> *"[38] The primary judge was entitled to conclude that a competent solicitor would formally communicate such a rejection promptly to his or her clients. Sometimes powerful proof or evidentiary support for a proposition is provided by the absence of something that would reasonably be expected to be present.*
>
> *[39] The absence of a letter or email communicating the rejection of the clause by the vendors is consistent with it having been overlooked by Mr Brischetto. A solicitor, in circumstances where there had been an explicit request for the inclusion of a detailed clause, which had been immediately rejected the following day, would be expected to communicate that rejection to his or her clients in writing. Were the rejection to be communicated orally, a careful file note of that conversation would be expected to be made. There was neither here."*

This was not a case therefore where the solicitor had no notes at all of the relevant attendance, as is too often the case. Needless to say, had there been no notes at all the position of the solicitor would have been even worse.

The problem here was that the notes did not deal adequately with the critical issue. The Risk Management lesson is obvious – not only do file notes need to be made, they need to properly deal with all matters of importance, otherwise your defence of a subsequent claim will be compromised.