

O'Donnell v N.T. Legal Aid Commission [1999] NTSC 118

PARTIES: MARTHA O'DONNELL
v
NORTHERN TERRITORY LEGAL AID
COMMISSION

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT EXERCISING
TERRITORY JURISDICTION

FILE NO: 99 of 1996 (9611917)

DELIVERED: 4 November 1999

HEARING DATES: 18 – 20 October 1999

JUDGMENT OF: Bailey J

REPRESENTATION:

Counsel:

Plaintiff: S. Gearin
Defendant: M. Maurice QC

Solicitors:

Plaintiff: Top End Women's Legal Service
Defendant: Cridlands

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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

O'Donnell v N. T. Legal Aid Commission [1999] NTSC 118
No. 99 of 1996 (9611917)

BETWEEN:

MARTHA O'DONNELL
Plaintiff

AND:

**NORTHERN TERRITORY LEGAL
AIDE COMMISSION**
Defendant

CORAM: Bailey J

REASONS FOR JUDGMENT

(Delivered 4 November 1999)

Introduction

- [1] This claim is brought against the defendant (“NTLAC”) for damages as a consequence of NTLAC’s alleged negligence in providing legal services to the plaintiff. The only issue to be decided is liability. The parties are agreed that if the plaintiff is successful, she is entitled to damages of \$128,000 plus interest.
- [2] At all material times NTLAC provided legal services to members of the public who met their guidelines.
- [3] On 15 March 1993, the plaintiff applied for legal assistance in relation to a proposed application for custody of and access to the children of her

marriage to Albert Stanley O'Donnell and for a property settlement arising out of her separation from Mr O'Donnell.

- [4] NTLAC accepted the application (in part) and agreed to provide the plaintiff with legal assistance in relation to a property settlement.
- [5] The major asset which was to be the subject of any property settlement between the plaintiff and her husband was the matrimonial home situated at 83 Bastin Road, Howard Springs. This property was purchased in the husband's name.
- [6] After the plaintiff had moved out of the matrimonial home in March 1993, without the plaintiff's knowledge, Mr O'Donnell listed the property for sale with a real estate agent. An offer to purchase was made on 30 April 1993 and accepted on 4 May 1993. Settlement took place on 31 May 1993 when Mr O'Donnell received the net proceeds of \$170,755.90.
- [7] On 11 March 1994, Moore J of the Family Court awarded the plaintiff 75% (\$128,000) of the proceeds of sale of the former matrimonial home. The plaintiff has not been able to recover any part of the funds owing to her and there appears to be no realistic possibility of any part of the award being recovered by the plaintiff.
- [8] The essence of the plaintiff's case is that Ms Virginia Baker, a legal practitioner then employed by NTLAC, was negligent in failing to lodge a

caveat over the Howard Springs property when instructed to do so by the plaintiff.

Evidence of the Plaintiff

[9] The plaintiff was the sole witness in her own case.

[10] The general background to the circumstances in which the plaintiff came to seek advice from NTLAC is not in dispute. The plaintiff, an Indonesian, was born in July 1959. In 1979, while working as a waitress in Ambon, she met Albert O'Donnell and they married a few months later. The plaintiff was then 20 years old and her husband was 59 years old. The couple moved to Australia in 1979 and lived in Darwin and Bathurst Island for various periods, eventually settling in Darwin.

[11] It is common ground that Mr O'Donnell was an alcoholic who was in the habit of becoming drunk on a daily basis. He was violent towards the plaintiff and was said to have sexually abused the plaintiff's daughter from a previous relationship. In March 1993, the couple together with their own daughter, Sarah (then aged 12 years) and the plaintiff's daughter from a previous relationship, Rumelda (then aged 15 years) were living at the matrimonial home at 83 Bastion Road, Howard Springs. The residence, situated on a 5 acre block, had been built by Mr O'Donnell with the assistance of a friend. The land had been purchased in the mid or late 1980s and was registered in Mr O'Donnell's name alone.

- [12] It was the evidence of the plaintiff, which I accept in this regard, that she had requested her husband to register the Howard Springs property in their joint names. Mr O'Donnell had refused and this was a source of argument between the plaintiff and her husband.
- [13] The plaintiff's first contact with Ms Baker of NTLAC was in October 1992. She sought general advice at an NTLAC clinic because she was then considering a separation from her husband. She sought advice as to the prospects of gaining sole occupancy of the Howard Springs property and division of property generally. Ms Baker encouraged the plaintiff to seek counseling and gave her general legal advice as to the options available to her under family law legislation.
- [14] In March 1993, following a violent incident between the plaintiff and her husband, Mr O'Donnell was granted a restraining order against the plaintiff, prohibiting her staying at the Howard Springs property. She moved to a women's refugee while Mr O'Donnell, Sarah and Rumelda continued to occupy the matrimonial home. On 15 March 1993, the plaintiff consulted Ms Baker about the restraining order granted in favour of Mr O'Donnell. She also completed an application for legal assistance (document 2.63A in Exh. D1) for a property settlement and custody of the two children. Subsequently, legal aid was granted for the purpose of "property settlement" only with effect from 25 March 1993 (documents 2.66 and 2.67 in Exh D1). A handwritten note of Ms Baker (doc. 2.64 in Exh D1) of a conference held with the plaintiff on 16 March 1993 relates almost exclusively to issues

concerning the restraining order obtained by Mr O'Donnell. There is a brief reference to the number of bedrooms and sleeping arrangements at the Howard Springs property, but nothing to indicate that the plaintiff and Ms Baker discussed issues relevant to a property settlement or custody application.

[15] It is at this point that the first substantial differences in the evidence of the plaintiff and Ms Baker begin to emerge.

[16] According to the plaintiff, on the first occasion that she consulted Ms Baker in March 1993, the plaintiff had requested that a caveat be placed on the Howard Springs property. The plaintiff's evidence was that she had come to know about the nature and effect of a caveat as a result of a conversation with a girlfriend. The plaintiff said that she had told Ms Baker of her belief that her husband intended to sell the property and that some two months previously a representative from a real estate office had come to inspect the house. Mr O'Donnell had said it was "nothing to do with her" and that the representative had just come to have a look. According to the plaintiff, Ms Baker had advised her that a caveat was unnecessary in words to the effect of : "Don't worry, if he sells the house, you will still get 60% of the proceeds".

[17] The plaintiff gave evidence that before seeing Ms Baker she was worried that Mr O'Donnell would sell the house and she would receive none of the proceeds. She said that Ms Baker's advice had reassured her and that at no

time subsequently in her dealings with Ms Baker was the subject of a caveat discussed again.

- [18] The plaintiff also gave evidence that at the March 1993 conference with Ms Baker, she believed that the relationship with her husband was probably at an end and that the parties would not reconcile. In addition to reassuring the plaintiff that she would receive 60% of the proceeds of a sale of the matrimonial property, the plaintiff's evidence was that Ms Baker had said words to the effect: "Why do you want to put a caveat on? If you go back to him, you won't need it".
- [19] The plaintiff denies that Ms Baker ever advised her that placing a caveat on the title to the Howard Springs property would be a "good idea" to protect her interests. She also denies that Ms Baker advised her that if a caveat was lodged, the office of the Registrar General would advise her husband of the lodgment and the identity of the person who had lodged the caveat.
- [20] In May 1993, the plaintiff instructed Ms Baker not to proceed with her application for a property settlement in the Family Court. The plaintiff's evidence was, at that time, she believed that there were reasonable prospects of a reconciliation with her husband whereby she would return to live at the matrimonial home.
- [21] It is common ground that Mr O'Donnell listed the Howard Springs property for sale with a real estate agent on 23 March 1993 and that an offer to purchase was made on 30 April and accepted by Mr O'Donnell on 4 May

1993. Settlement took place on 31 May. Mr O'Donnell received the net proceeds of \$170,755.90. The transfer of title to the new owners was registered on 2 June 1993.

[22] It was the evidence of the plaintiff that she was not aware of the sale of the property until 7 June 1993. On that date, the plaintiff gave evidence that she had telephoned the Howard Springs property to talk to her daughter. She had spoken to a person who claimed to be the new owner of the property. In evidence, the plaintiff claimed that following this telephone conversation and as a result of talking to a friend, she had gone to the Land Titles Office on 7 June 1993, paid a search fee and received the results of a search of the Howard Springs property. She had immediately taken the search certificate to Ms Baker who arranged an urgent application to the Family Court to restrain Mr O'Donnell from disposing of the settlement monies for the Howard Springs property, vehicles and other chattels. The application was granted by the Judicial Registrar of the Family Court during the afternoon of 7 June 1993.

[23] According to the plaintiff, when informed of the sale of the Howard Springs property, Ms Baker again reassured the plaintiff that she need not worry as she would still receive 60% of the sale proceeds.

[24] The plaintiff swore an affidavit (document 2.9 in Exh D1) in support of the urgent application to the Family Court on 7 June 1993. The plaintiff was

cross-examined about parts of this affidavit, in particular, she was referred to the following statements and gave evidence as follows:

- (a) *“On 5 June 1993 Sarah returned to Darwin and is residing with me. Sarah told me that Bert (Mr O’Donnell) had sold the Howard Springs property”* (para. 9)

The plaintiff maintained that she had learnt of the property sale when she telephoned the Howard Springs property and spoke to a person claiming to be the new owner.

- (b) *“On 7th June I telephoned my solicitor and advised her that I believed that Bert had sold the matrimonial property. My solicitor advised me that she would conduct a search of the certificate of title in order to see what was going on.”* (para.10).

The plaintiff maintained that it was she, not Ms Baker, who conducted the search at the Lands Titles Office.

- (c) *“Knowing the way Bert felt about me, I didn’t believe that there was a risk that he would do anything with the property and I thought we could sought (sic) this out between us at a later date”* (para. 12).

The plaintiff's evidence was that this statement was not true at the date of the affidavit. The plaintiff maintained that, at all times since separating from her husband in March 1993, she had believed that Mr O'Donnell intended to sell the Howard Springs property and further believed that Mr O'Donnell would never agree to the plaintiff obtaining an interest in the property or its proceeds. The plaintiff also gave evidence that she was not confident of ever receiving any of the proceeds from a sale of the property even if the Family Court recognized her interest in the property. The plaintiff believed at all times that Mr O'Donnell would seek to prevent her from obtaining any part of the proceeds from a sale of the property.

[25] The plaintiff accepted that the affidavit contains no reference to a representative of a real estate office inspecting the property some time before the conference with Ms Baker in March 1993. Similarly, the plaintiff accepted that the affidavit makes no reference to her having telephoned the Howard Springs property on 7 June 1993 and spoken to a person claiming to be the new owner.

[26] In explaining her decision (May 1993) not to proceed with an application to the Family Court for a property settlement, the plaintiff conceded in cross-examination that she was afraid that if Mr O'Donnell came to learn that she was seeking a property settlement or that a caveat had been lodged on the title to the matrimonial home, he might become angry and seek to prevent her obtaining anything from the house or chattels in his possession. She

accepted that if her husband received notice of a caveat this would have destroyed any prospects of a reconciliation between the parties. In the plaintiff's view, during the time that she consulted Ms Baker, she had two choices:

- (a) to reconcile with Mr O'Donnell and return to live in the family home; or
- (b) to separate permanently from Mr O'Donnell.

[27] The plaintiff considered that if she reconciled with Mr O'Donnell there was a chance she would obtain the entire property (real and personal) held by Mr O'Donnell in view of his advanced age, alcoholism and ill-health. On the other hand, if she separated from Mr O'Donnell, the plaintiff considered that she might end up with nothing, regardless of any orders for a property settlement made by the Family Court.

Evidence of the Defendant

[28] Ms Baker gave evidence that following completion of a combined arts/law degree in 1989, she had entered articles of clerkship with a firm of solicitors, Cridlands, in early 1990. During her twelve month articles, she had spent most of her time working with Mr Cecil Black, a very experienced family law practitioner. In early 1991, Ms Baker had resigned from Cridlands and joined NTLAC as a newly admitted legal practitioner. During her first twelve months, Ms Baker had worked mainly in the family

law area and after twelve months, at her request, she had worked almost exclusively in that field until resigning from NTLAC on 7 June 1993.

[29] Ms Baker gave evidence of first meeting the plaintiff in October 1992 in the course of a NTLAC clinic. She had given the plaintiff general advice during a ten or fifteen minute consultation on her position under the *Family Law Act* (Cmth.) in terms of seeking (joint) custody of her children and a property settlement.

[30] As I have previously noted, the next occasion on which the plaintiff consulted Ms Baker was 15 March 1993. The purpose of this consultation was principally for the plaintiff to seek advice about the restraining order granted in favour of Mr O'Donnell against the plaintiff (and in that regard Ms Baker represented the plaintiff on 16 March 1993 before Mr Hannon SM). The plaintiff also completed an application for legal assistance for a property settlement and custody of the two children. According to the evidence of Ms Baker, at no time during 15 and 16 March 1993 was the question of placing a caveat on the title to the Howard Springs property discussed. In particular, Ms Baker expressly denied that the plaintiff referred to any belief that Mr O'Donnell intended to sell the property or that a representative of a real estate office had inspected the property. Ms Baker also denied that the plaintiff made any request for lodgment of a caveat or that she advised the plaintiff that such action was unnecessary.

[31] According to Ms Baker, the question of a caveat was first raised by Ms Baker herself at a conference with the plaintiff on a date within the period 29 March to 1 April 1993. During this conference, Ms Baker commenced collecting information for the purpose of preparing applications to the Family Court, including an application for a property settlement. Ms Baker gave evidence about the complexity of completing a statement of the plaintiff's financial circumstances and referred to seven pages of handwritten notes (document 2.342 in Exh D1) recorded during this conference.

[32] Ms Baker gave evidence that during the course of this conference she had advised the plaintiff of the nature and effect of a caveat and the desirability of lodging one against the title to the Howard Springs property to protect the plaintiff's interests. She had explained to the plaintiff how the plaintiff's interest in the matrimonial home arose through her contribution to a long-standing marriage. She also explained that in the absence of a caveat, there was a risk that Mr O'Donnell could sell the property without her knowledge and dissipate the proceeds. According to Ms Baker, the plaintiff had queried why her application for a property settlement could not proceed in the Family Court without lodgment of a caveat. Ms Baker said that she had explained the time necessary to obtain court orders and the consequent risk of her husband disposing of the property or its proceeds before court orders could be obtained. Ms Baker gave evidence that she also explained that if a

caveat was lodged, Mr O'Donnell would be advised as to the fact of the caveat and the identity of the person who had lodged it.

[33] Ms Baker's handwritten notes taken during the conference (document 2.342 in Exh D1) do not reflect any discussion or advice given regarding caveats at the conference held between 29 March and 1 April 1993.

[34] According to Ms Baker, another conference was held with the plaintiff on 8 April 1993 (a Thursday, immediately before the 1993 Easter holiday). Ms Baker gave evidence that, on this occasion, she had again explained the effect of lodging a caveat over the Howard Springs property and why such action was in the plaintiff's best interests. Her evidence was that at this conference, the plaintiff gave clear instructions for lodgment of a caveat. Following the Easter break, Ms Baker had arranged for an urgent search of the property's title at the Lands Titles Office (document. 2.76 in Exh D1). This was on 14 April 1993 (allowing for the Easter break, this was the second working day after she had received instructions for lodgment of the caveat). Ms Baker explained that she had requested an urgent search as she was due to see the plaintiff again on 16 April 1993 and intended to have the plaintiff sign the application for the caveat on that date.

[35] Ms Baker gave evidence that she was aware that it would have been possible for her (as the plaintiff's solicitor) to have completed the application for a caveat on behalf of the plaintiff (see Form 40 and accompanying note 10 in the Real Property Regulations).

[36] Her evidence was that she decided to have the plaintiff personally sign the application because the plaintiff had a history of changing her mind and she wished to be sure that she had instructions to proceed with lodgment of a caveat.

[37] According to Ms Baker, on 16 April 1993, an application for a caveat had been prepared and was ready for signature. She had again explained the effect of a caveat and advised the plaintiff it was in her best interests to lodge a caveat. The plaintiff declined to sign the application and told Ms Baker that she wished to proceed with an application for a property settlement through the Family Court. The plaintiff had also said that she did not want her husband to learn that she was seeking an interest in the property. Ms Baker's evidence was that she considered the plaintiff's position illogical and confusing. In her view, the step of lodging a caveat was a less drastic one than serving Mr O'Donnell with Family Court documents that indicated the plaintiff was seeking a property settlement. Ms Baker's evidence was that despite her efforts to persuade the plaintiff to sign the application for a caveat, the plaintiff maintained her refusal to do so.

[38] Ms Baker's handwritten notes of the conferences held on 8 April and 16 April 1993 (documents 2.71 and 2.77 in Exh D1) contain no reference to either the plaintiff's instructions to lodge a caveat (on 8 April 1993) or the withdrawal of those instructions (on 16 April 1993). Ms Baker accepted

that no notes in the discovered NTLAC file record these matters. She added that it is her belief that the discovered NTLAC file is not complete.

[39] Her evidence was that in 1993 it was her usual practice to make a note of all instructions from clients and any withdrawal of such instructions, particularly where this was against her advice. She noted that the draft application for a caveat was missing from the NTLAC file and that her notes of the conference held on 8 April 1993 (document 2.71 in Exh D1) appeared incomplete (by reference to the absence of a date in accordance with her usual practice and the appearance of the first line in document 2.71 which indicated it was a continuation from another page or pages).

[40] Ms Baker maintained throughout her evidence that:

- (a) the subject of a caveat was always raised by herself and never by the plaintiff;
- (b) she had never advised the plaintiff that a caveat was unnecessary;
- (c) she had never advised the plaintiff not to worry as she would obtain 60% of the proceeds if the property was sold; and
- (d) she had never said to the plaintiff words to the effect: “Why put a caveat on if your are going to reconcile”.

[41] Following the conference of 16 April 1993, according to Ms Baker, her next contact with the plaintiff was by telephone on around 5 May 1993.

According to Ms Baker, the plaintiff advised her that she did not want to

proceed with an application for a property settlement “at this stage”.

Ms Baker’s evidence was that she discussed the situation at length with the plaintiff because Ms Baker was concerned that the plaintiff could be left with nothing, having already declined to lodge a caveat and now deciding not to proceed with a property settlement. Ms Baker said that she was highly alarmed by the plaintiff’s decision not to proceed with an application for a property settlement and insisted that the plaintiff attend her office to confirm those instructions. Ms Baker’s evidence was that the plaintiff had attended the NTLAC office the same day and confirmed that she did not wish to proceed with a property settlement at that time. She had explained that she was considering a reconciliation with Mr O’Donnell, but was concerned about her daughter, Rumelda. Ms Baker’s evidence was that she had again warned the plaintiff of the risk of her husband disposing of the Howard Springs property without her knowledge in the absence of a caveat. The plaintiff had replied to the effect that her husband loved her and would not do that to her.

[42] Ms Baker’s handwritten notes of the telephone conversation and conference of 5 May 1993 (documents 2.82 and 2.81 in Exh D1) make no reference to any discussion of a caveat.

[43] On 6 May 1993, Ms Baker again saw the plaintiff. On this occasion, the plaintiff signed an application to the Family Court (Document 2.4 in Exh D1) limited to custody, guardianship and access issues regarding Sarah and Rumelda.

[44] On 17 May 1993, according to Ms Baker, the plaintiff had telephoned her and sought her advice as to whether to reconcile with Mr O'Donnell.

Ms Baker said that she had advised the plaintiff that this was a subject on which the plaintiff had to make up her own mind and not one upon which Ms Baker could provide advice. Ms Baker's note of the conversation (document 2.86 in Exh D1) includes the phrase "... talking about property but I couldn't understand what she was saying". Ms Baker's evidence was that this was a reference to her not understanding the stance adopted by the plaintiff, namely that the plaintiff's motivation for reconciling with Mr O'Donnell appeared to be solely to obtain an interest in property held by him. Ms Baker said that she had explained to the plaintiff that she did not have to return to her husband to achieve that - application could be made to the Family Court. However, the plaintiff had replied that Mr O'Donnell "would find a way to stop her".

[45] According to Ms Baker, the plaintiff telephoned her on 2 June 1993 and advised her that she had made a definite decision to reconcile with Mr O'Donnell. At the plaintiff's request Ms Baker had attempted unsuccessfully to contact Mr O'Donnell who was staying in Geelong with his son from a former marriage. On 3 June 1993, the plaintiff advised that her daughter Sarah, who had been staying with Mr O'Donnell in Geelong, had said Mr O'Donnell wanted to sell the Howard Springs property. Ms Baker's evidence was that this was the first indication that Mr O'Donnell might sell the property. On 4 June 1993, according to

Ms Baker's evidence, the plaintiff advised that removalists were at the Howard Springs property and that Mr O'Donnell had had delivered to her clothing and personal items of the plaintiff and her two children. The plaintiff had maintained throughout the telephone conversations of 2, 3 and 4 June 1993 that she intended to reconcile with Mr O'Donnell and move back into the matrimonial home. Ms Baker said that she had advised the plaintiff that Mr O'Donnell's actions did not appear consistent with any desire on his part for a reconciliation.

[46] On 4 June 1993 Ms Baker's evidence was that she had dictated one and possibly two 'hand-over' file notes regarding the plaintiff's matter as she was to leave NTLAC on 7 June 1993. One note (document 2.337 in Exh D1) is undated while the other (document 2.92 in Exh D1) bears the date 4 June 1993. Both notes emphasis the difficulty and the necessity of obtaining clear instructions from the plaintiff. The plaintiff is variously described as a "very difficult" or "extremely difficult" client who had vacillated in her instructions. The dated note refers to the plaintiff's decision to reconcile with her husband and continues:

"Sarah apparently advised our client that the husband intends to put the matrimonial home on the market. NOTE: Our client's name is not registered on the title. I think it would be very prudent to put a caveat on the title as soon as possible. Do this regardless of whether our client says that she intends to reconcile or not. Martha vacillates constantly between wanting to go back to her husband and to press on with her proceedings."

- [47] Ms Baker gave evidence that she was concerned to protect the plaintiff's interests and that in view of the plaintiff's refusal to sign an application for a caveat previously and the new advice from Sarah that Mr O'Donnell was considering a sale of the Howard Springs property, she felt that action had to be taken.
- [48] According to Ms Baker, on 7 June 1993, the plaintiff had come to the NTLAC office and said she believed that Mr O'Donnell had sold the property. Ms Baker arranged an immediate search of the title and as a result prepared an affidavit on the plaintiff's instructions (document 2.9 in Exh D1) for an urgent *ex parte* application to restrain Mr O'Donnell from dissipating the settlement monies received for the matrimonial home and from disposing of two motor vehicles and other chattels. The application was granted by the Judicial Registrar of the Family Court during the afternoon of 7 June 1993.
- [49] In addition to Ms Baker, the defence called evidence from Ms Agatha Athanasiou who has been a legal secretary employed by NTLAC since 1990 and worked in a similar capacity for solicitor firms for some years before that date.
- [50] Ms Athanasiou gave evidence that she had worked in the Family Law Section of NTLAC in 1993 and had come to know the plaintiff quite well through telephone conversations and conversations in the offices of NTLAC and in casual encounters outside those offices. She recalled in 1993 that Ms

Baker had discussed with her preparation of an application for a caveat in relation to the plaintiff. Ms Baker had told her that the plaintiff had not wanted to sign the application because she was considering a reconciliation with her husband. The conversation had been initiated by Ms Athanasiou because she was aware that a caveat application had been prepared for the plaintiff's signature and it was part of Ms Athanasiou's duties to organise lodgment of such applications.

[51] The above evidence of Ms Athanasiou was not challenged by the defence. In cross-examination she said that during her employment with NTLAC she had typed 6 to 12 application for caveats, but could not recall the names of the relevant clients aside from that of the plaintiff.

[52] The third and final witness for the defence was Ms Josephine Stone who has been employed by the NTLAC since 1991 and is presently appointed as Manager of Assignments.

[53] Ms Stone gave evidence that she had known Ms Baker during her employment at the NTLAC during 1992 and 1993. According to Ms Stone, while Ms Baker was not under her direct supervision, they had frequently discussed matters relevant to NTLAC clients on a casual basis.

[54] Ms Stone's evidence was that she recalled that the plaintiff was a client of NTLAC being handled by Ms Baker. She recalled a discussion with Ms Baker in which Ms Baker had expressed her deep concern about the difficulty of obtaining instructions from the plaintiff who wanted custody

issues and a property settlement resolved while seeking to reconcile with her husband. Ms Stone specifically recalled that Ms Baker had told her that the plaintiff had decided not to lodge a caveat on the title to the matrimonial home after Ms Baker had advised the plaintiff that her husband would be informed of any caveat lodged and the identity of the person who had lodged it. According to Ms Stone, both Ms Baker and legal secretaries employed in NTLAC had expressed concern about the plaintiff's uncertainty whether to pursue a property settlement. A particular concern was that the plaintiff was considering reconciling with her husband, a man who was alleged to have sexually abused the plaintiff's daughter.

[55] The above evidence of Ms Stone was not challenged by the defence. In cross-examination, Ms Stone accepted that her recollection of conversations with Ms Baker about the plaintiff took place on social occasions, the dates of which could not now be recalled.

Relevant Law

[56] In the circumstances of this case, very little need be said about the relevant law concerning the duties of a solicitor to give advice to a client and to act upon a client's instructions. The essential issues in the present case are the credit of Ms Baker and the plaintiff, albeit that the scope of a solicitor's duties may become relevant if the plaintiff's version of events as to what occurred at the March 1993 conference is rejected and Ms Baker's version of what occurred at the conference held on 8 April 1993 is accepted.

[57] The standard of care owed by a solicitor to a client is that described by Deane J in *Hawkins v Clayton* (1987-88) 164 CLR 539 at 580:

“...the standard or measure of care which was reasonable in the circumstances ... namely, the case and skill to be expected of a qualified and ordinarily competent and careful solicitor in the exercise of his profession.”

(See also *Voli* (1963) 110 CLR 74 and *Hanflect Pty Ltd v N.S. Hope & Associates* [1990] 2 QR 218).

[58] In assessing whether that standard has been met in a particular case, the Court may rely on its own knowledge concerning what the ordinary reasonably prudent and careful solicitor ought to know and do (per Bray CJ in *Neagle v Power* [1967] SASR 373 at 376) – although that would not preclude the calling of expert evidence.

[59] For present purposes, the only other relevant law which requires consideration at this point concerns the resolution of disputes as to credit between a solicitor and client.

[60] In *Griffiths v Evans* [1953] 1 WLR 1424 at 1428, Denning LJ observed:

“... I would observe that where there is a difference between a solicitor and his client ... the courts have said, for the last 100 years or more, that the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight is to be given to it ... The reason is plain. It is because the client is ignorant and the solicitor is, or should be, learned. If the solicitor does not take the precaution of getting a written retainer he has only himself to thank for being at variance with his client over it and must take the consequences.”

[61] In commenting upon this passage in *Dew v Richardson*, Supreme Court of Queensland, unreported, writ no. 4264 of 1997, delivered 18 August 1999, Chesterman J said:

“The judgment was a dissenting one. The other Lord Justices merely noted that the solicitor’s evidence had been accepted by the trial judge and, conventionally, decided the case in accordance with the finding on credit. I cannot accept it is a principle of law that wherever a solicitor and his client disagree about the terms of a retainer (or advice) and the solicitor has not made a written note of the communication the client’s evidence *must* be accepted. Findings of fact, especially those based upon an opinion as to the creditworthiness of witnesses, are to be made from a careful and objective examination of the evidence adduced with respect to those facts. To introduce the notion that in a given circumstance facts must be found a certain way is to replace justice in the individual case determined by the application of legal principle to idiosyncratic facts with the arbitrariness of a determination made by reference to a mindless ritual.

I approach the critical question on the basis that both client and solicitor, plaintiff and defendant, have an equal right to be believed. Which of their respective versions is to be accepted will depend upon the persuasiveness of their evidence as judged by surrounding, objective circumstances.

[62] With respect, I agree with the observations of Chesterman J above. There can be no inflexible rule that the evidence of a client is to be preferred to that of a solicitor whenever the latter’s version of events is not corroborated by a contemporaneous note. The existence (or not) of such a note is, of course, an important factor to be considered, but it would be an abrogation of judicial responsibility to determine issues of credit solely on the basis of whether a solicitor made a note at the time or, even worse, whether a note which was made was still in existence at the date of a trial.

Plaintiff's Case

[63] The case for the plaintiff is that Ms Baker on behalf of NTLAC was retained in connection with a proposed property settlement between the plaintiff and her husband. Under such a retainer, it was at least Ms Baker's duty to ascertain and protect the real and personal matrimonial property in the hands of the husband pending a Court order or agreement between the parties. The plaintiff submits that, in the circumstances of this particular case, the standard of care owed by Ms Baker to the plaintiff required Ms Baker to lodge a caveat over the Howard Springs property to protect that asset. According to the plaintiff, such a caveat was required to be lodged in accordance with the express instructions of the plaintiff at the March 1993 conference or, at least (on the defendant's case) in accordance with the instructions said to have been given to Ms Baker by the plaintiff on 8 April 1993.

The Credibility of the Plaintiff and Ms Baker

[64] For the plaintiff, Ms Gearin, has submitted that the plaintiff's evidence should be believed and that of Ms Baker rejected.

[65] In support of those submissions, Ms Gearin emphasised the personal circumstances of the plaintiff at the relevant time in 1993. I accept that the plaintiff was a poorly educated Indonesian woman who spoke English as a second language and who was living at a women's refuge without financial resources. She was also dealing with an alcoholic husband who had been

accused of sexual abuse by her own daughter. In short, I find, in accordance with Ms Gearin's submission, that the plaintiff was extremely vulnerable.

[66] Ms Gearin placed a very considerable emphasis on the absence of any notes in the NTLAC file to support Ms Baker's evidence as to what was discussed with the plaintiff concerning lodgment of a caveat over the Howard Springs property. As Ms Gearin stressed, the only reference to a caveat in the entire NTLAC file occurs in Ms Baker's 'hand-over' note dated 4 June 1993. In Ms Gearin's submission, the absence of documentary evidence to support the evidence of Ms Baker provides a strong reason to accept the plaintiff's evidence as credible and reliable.

[67] Ms Gearin also pointed to the evidence of Ms Baker that the plaintiff gave her clear and unambiguous instructions to lodge a caveat during a conference of 8 April 1993. In Ms Gearin's submission, Ms Baker's evidence that the plaintiff withdrew her instructions to lodge a caveat on 16 April 1993 is simply incredulous in the absence of written instructions from the plaintiff, or at the very least a note by Ms Baker, in circumstances where it is said a client refused to accept advice designed to protect her interest in the matrimonial home. Ms Gearin also noted that it was a condition of the grant of legal aid to the plaintiff that:

“if the client does not accept the advice of a solicitor or a barrister engaged to act for the client, the NT Legal Aid Commission may cancel the grant of legal assistance”. (document 2.67 in Exh. D1)

- [68] There was no evidence that Ms Baker sought to refer the plaintiff's file to her superiors at NTLAC for consideration of exercising this discretion.
- [69] Ms Gearin also emphasised that the evidence of Ms Baker was that at a conference on 5 May 1993 the subject of a caveat was again discussed – but again there is no reference to the issue in Ms Baker's contemporaneous notes (documents 2.82 and 2.81 in Exh D1).
- [70] In relation to the two 'hand-over' notes written by Ms Baker on or about 4 June 1993 (documents 2.337 and 2.92 of Exh D1), Ms Gearin stressed the lack of any reference to the plaintiff having withdrawn instructions for lodgment of a caveat. In Ms Gearin's submission the note dated 4 June 1993 (document 2.92) indicates precisely what a ordinary, reasonably prudent and careful solicitor should have done weeks or months previously, namely, lodge a caveat on the title to the Howard Springs property.
- [71] Ms Gearin also submitted that Ms Baker's explanation for not lodging a caveat during the period 8 to 14 April 1993 (when she had clear and unambiguous instructions to do so) namely, because of Ms Baker's desire that the plaintiff personally sign the application, is inadequate and inconsistent with the standard of care owed by a solicitor to a client.
- [72] It will be apparent from the above brief summary of submissions made on behalf of the plaintiff that the arguments in favour of accepting the evidence of the plaintiff and, correspondingly rejecting that of Ms Baker rely less on

the strength of the plaintiff's case and more on the weakness of the defence case.

[73] It must be said at once that, in the light of Ms Baker's evidence, the complete absence in the NTLAC file of any reference to consideration of lodging a caveat over the Howard Springs property (aside from Ms Baker's 'hand-over' note of 4 June 1993) is extraordinary. According to Ms Baker, the issue was discussed with the plaintiff:

- (a) at a conference held between 29 March and 1 April 1993 (when the plaintiff was reluctant to lodge a caveat, preferring to proceed only with an application to the Family Court for a property settlement);
- (b) at a conference on 8 April 1993 (when the plaintiff gave instructions to lodge a caveat);
- (c) at a conference on 16 April 1993 (when such instructions were withdrawn); and
- (d) during a telephone conversation and at a subsequent conference on 5 May 1993 (when the plaintiff gave instructions not to proceed with an application to the Family Court for a property settlement).

[74] One would expect that the ordinary, reasonably prudent and careful solicitor would have made contemporaneous notes of such discussions and particularly so where a client was refusing or reluctant to accept advice for action which the solicitor considered necessary to protect the client's

interests in a pending property settlement. However, as I have indicated the conflict in evidence between the plaintiff and Ms Baker cannot be resolved simply on the basis of the existence or non-existence of a solicitor's notes at the date of trial.

[75] While the absence of notes by Ms Baker is in the circumstances extraordinary, no less extraordinary is the version of events put forward by the plaintiff in her evidence.

[76] It will be recalled that, according to the plaintiff, at the March 1993 conference with Ms Baker, the plaintiff expressly instructed Ms Baker to lodge a caveat (based on the advice of a friend) having advised her of the plaintiff's fears that her husband's intended to sell the Howard Springs property. The plaintiff says that she was advised that, in practical terms, a caveat was unnecessary and that if her husband sold the house, she would still receive 60% of the proceeds.

[77] At the time of this advice, the (unchallenged) evidence is that Ms Baker had been working as an articled clerk and subsequently as an admitted legal practitioner for more than two years mostly in the field of family law. It almost defies belief that a person with such experience could or would have advised the plaintiff in the terms described by the plaintiff. Having seen and heard Ms Baker give evidence, I am entirely satisfied that she did not do so.

[78] The finding I have reached in this regard does not depend solely on the implausibility of a legal practitioner of Ms Baker's background and experience offering such grossly negligent advice. Other aspects of the plaintiff's evidence provide substantial support for the conclusion that the plaintiff's evidence is not to be believed as to what occurred at the March 1993 conference. In particular, I consider that the plaintiff's evidence that she accepted fully Ms Baker's alleged assurances that she need not worry as she would still obtain 60% of the proceeds if her husband sold the house is totally lacking in credibility. Such a meek acceptance and total faith in what was purportedly said by Ms Baker was contradicted by the plaintiff's evidence that at all times since separating from her husband she believed that he would never agree to her obtaining an interest in the property or its proceeds. Similarly, it was contradicted by the plaintiff's evidence that she was not confident of ever receiving any of the proceeds from a sale of the property even if the Family Court made orders in her favour.

[79] The plaintiff also gave evidence that she was afraid that if Mr O'Donnell came to learn that a caveat had been lodged on the title of the matrimonial home he might become angry and seek to prevent her obtaining anything from the real property or chattels in his possession. Such evidence is inconsistent with any supposed instructions to Ms Baker for lodgment of a caveat at the March 1993 conference or blind faith in assurances from Ms Baker that such action was unnecessary.

[80] In evidence, the plaintiff when faced with difficult or unwelcome questions in cross-examination by Mr Maurice QC frequently sought to explain her actions – or more usually inaction – by resort to repeating that she had relied on Ms Baker’s reassurances that “she need not worry as she would still receive 60% of the sale proceeds” if Mr O’Donnell sold the property. Her evidence went so far as to assert that Ms Baker had repeated this reassurance on 7 June 1993 after learning that the property had been sold.

[81] The evidence, which I accept, is that on 7 June 1993 the plaintiff, having learnt of the sale of the matrimonial home, arrived at the NTLAC office in a state of high emotion and panic. Ms Baker abandoned a celebratory lunch on the last day of her employment with NTLAC to prepare an urgent application and supporting affidavit for an *ex parte* injunction to prevent Mr O’Donnell disposing of the proceeds of sale. I consider that it is completely fanciful to suggest that in such circumstances Ms Baker would have told the plaintiff not to worry as she would still receive 60% of the proceeds of sale. The plaintiff’s evidence of Ms Baker’s alleged reassurance of 7 June 1993 is, in keeping with the entirety of her evidence as to the question of a caveat, either a fantasy or a fabrication. In either event, the plaintiff’s account is not to be believed.

[82] I agree with the submission of Mr Maurice that to accept the plaintiff’s version of events I would need to find Ms Baker was not merely inexperienced and incompetent but also naïve to the point of being obstinately stupid. On the contrary, I am satisfied that Ms Baker, while

relatively inexperienced as a legal practitioner generally was reasonably experienced in the field of family law. I also find on the basis of all the evidence that she was competent, conscientious and at all times concerned to protect her client's interests.

[83] While the lack of contemporaneous notes by Ms Baker remains a concern, it is not of such significance in the circumstances of the present case to persuade me that the evidence of the plaintiff should be preferred to that of Ms Baker. The notes of the March 1993 conference (document 2.64 in Exh D1) provide no support for the version of events given by the plaintiff that she gave Ms Baker express instructions to lodge a caveat. This is not a case where the plaintiff alleges that there was never a discussion about a caveat. The absence of notes generally by Ms Baker referring to this topic certainly does not assist the case for NTLAC, but equally the lack of any reference to a caveat in Ms Baker's notes for the March 1993 conference does nothing to assist the version of events put forward by the plaintiff.

[84] I am satisfied that wherever there are differences between the evidence of the plaintiff and Ms Baker, the evidence of Ms Baker is to be preferred. Ms Baker was unable to explain the absence of contemporaneous notes to support her version of events despite giving evidence that it was her usual practice to note any instructions from a client and any withdrawal of such instructions. Ms Baker did not seek to embellish her evidence by positively asserting that she had made notes which no longer appeared on the NTLAC

file. She did suggest that she may have made notes which no longer appear on the NTLAC file.

[85] There is evidence that the NTLAC file is now incomplete. In this regard I find that the available notes by Ms Baker for the conference held on 8 April 1993 (document 2.71 in Exh D1) are incomplete. It is evident that the first page of those notes is a continuation from another document or documents which is or are not now on the NTLAC file. There is evidence that other documents are also missing from the file (for example the draft caveat prepared for the plaintiff's signature on 16 April 1993 and a draft application for a property settlement and custody of the children which was re-drafted after 5 May 1993 to accommodate the plaintiff's new instructions that she did not wish to pursue a property settlement at that time).

[86] The plaintiff in evidence was unable to offer any explanation for the inconsistencies (see paragraph [24] above) between her evidence in this Court and her affidavit (7 June 1993) prepared for the urgent application to the Family Court on 7 June 1993. In evidence, the plaintiff accepted that she had read and understood the affidavit before signing it. It was not suggested to Ms Baker that the affidavit had been drafted by her to include false statements or deceive the Family Court in an *ex parte* application. At most, Ms Gearin's submissions faintly suggested that the affidavit had been prepared and signed in haste. Even if that is accepted, it falls a long way short of an adequate explanation for the plaintiff swearing on affidavit

which includes the following statement which the plaintiff said in evidence was untrue:

“Knowing the way Bert felt about me, I didn’t believe that there was a risk that he would do anything with the property....”
(para 12 in document 2.9 in Exh D1)

[87] That statement is consistent with Ms Baker’s evidence that in early June 1993 the plaintiff was determined to reconcile with her husband and believed he was willing to do so. It is entirely inconsistent with the plaintiff’s evidence in this Court that she believed at all relevant times that her husband would seek to prevent her gaining an interest in the matrimonial home or the proceeds of its sale.

[88] In the result, in the light of all the evidence, I disbelieve that plaintiff’s version of events regarding what occurred at the March 1993 conference. I find the evidence of Ms Baker is to be believed in relation to that conference and in particular, I find that there was no discussion of a caveat at that conference.

[89] The matter, however, does not rest there. Notwithstanding the lack of any evidence from the plaintiff that she instructed Ms Baker to lodge a caveat on 8 April 1993 and despite the plaintiff’s evidence that the subject of a caveat was never discussed again after the March 1993 conference, Ms Gearin submits that NTLAC (vicariously through Ms Baker) was negligent in not lodging a caveat in the light of the plaintiff’s instructions to do so on 8 April 1993.

[90] The only evidence that the plaintiff gave “clear and unambiguous” instructions for lodgment of a caveat on 8 April 1993 comes from the defence case. Similarly, the only evidence that the plaintiff withdraw such instructions on 16 April 1993 comes from the defence case. Support for Ms Baker's version of events as to what occurred at those two conferences comes from the evidence of Ms Athanaisou and Ms Stone. In somewhat of an “each way bet” Ms Gearin attacked Ms Baker’s version of events by reference to the absence of contemporaneous notes corroborating Ms Baker’s evidence, but left unchallenged the evidence of Ms Athanasiou and Ms Stone. I am in doubt that the evidence of Ms Baker as to what occurred on 8 April 1993 and 16 April 1993 should be accepted, namely that the plaintiff instructed Ms Baker to lodge a caveat and then withdrew those instructions on 16 April 1993. Such a withdrawal is consistent with the plaintiff’s evidence that she was afraid that, if Mr O’Donnell came to learn that a caveat had been lodged, he would become angry and seek to prevent her obtaining any interest in the matrimonial home or its proceeds. Such notice would also destroy any prospects of a reconciliation, which the plaintiff regarded as her best chance of obtaining an interest in the real property and chattels held by her husband.

[91] Ms Gearin submits that if Ms Baker’s evidence as to the plaintiff’s instructions on 8 April 1993 is accepted, Ms Baker was negligent in not carrying out those instructions by lodging a caveat signed on behalf of the plaintiff at the first opportunity. Ms Gearin emphasised the need for

urgency in lodgment of caveats in cases such as the present because of the risk that a spouse, in whose sole name property was registered, might dispose of it (and the proceeds) without notice.

[92] Ms Baker's evidence was that she preferred to have the plaintiff personally sign the application for a caveat because the plaintiff had vacillated in her instructions as to lodgment of a caveat and had expressed concern of her husband coming to learn of her seeking an interest in the Howard Springs property.

[93] Mr Maurice submitted that Ms Baker's decision to wait until 16 April 1993 for the plaintiff to sign the caveat was reasonable and correct in the circumstances. In this regard, he emphasised that at this stage Ms Baker had no reason to believe Mr O'Donnell was considering a sale (which I accept, having rejected the plaintiff's evidence of what occurred at the March 1993 conference). She also might reasonably have expected the plaintiff's daughters to become aware (and inform the plaintiff) of any moves to sell the property as her younger daughter resided there with her father and the elder daughter stayed from time to time. Mr Maurice also stressed the evidence of Ms Baker that the plaintiff was frequently uncertain as to whether to attempt a reconciliation with her husband. In this regard, Mr Maurice stressed that at April 1993 no proceedings were on foot in the Family Court for either a property settlement or custody of the children and that notice of a caveat might well have inflamed an already delicate situation, as the plaintiff had already made known to Ms Baker.

[94] In the absence of expert evidence to the contrary from a legal practitioner experienced in family law, I consider the submissions of Mr Maurice compelling. The evidence of Ms Baker, which I accept, is that the plaintiff had waxed and waned about whether she wished to pursue a property settlement and custody application or a reconciliation with her husband. The plaintiff's evidence was that she had directed that NTLAC correspondence was to be held for her collection and not sent to the Howard Spring address. This was because notice of the plaintiff seeking legal advice would, in the plaintiff's opinion, anger Mr O'Donnell and reduce her prospects of gaining any interest in the matrimonial property whether by way of a court order or reconciliation. I also accept that on the information known to Ms Baker that there was no particular need for urgency as at 8 April 1993 for lodgment of a caveat. In the circumstances, I am satisfied that Ms Baker's decision to wait until 16 April 1993 for the plaintiff to sign the application personally was not only prudent, it was the only correct course to adopt in the circumstances. The correctness of this course was confirmed by later events - in particular by the withdrawal of the plaintiff's instructions on 16 April and later again on 5 May 1993 when the plaintiff decided to suspend action for a property settlement in the hope of a reconciliation with her husband.

[95] In the event, I am satisfied that Ms Baker was in no sense guilty of negligence in failing to lodge a caveat over the Howard Springs property. The plaintiff's version of events as to what occurred at the March 1993

conference is not worthy of belief and I reject it entirely. Ms Baker's decision not to immediately, or at least promptly, lodge a caveat on the basis of the plaintiff's instructions on 8 April 1993 (which I accept were given despite the plaintiff's evidence that caveats were never discussed again after the March 1993 conference) and subsequently to accept the withdrawal of those instructions despite seeking to persuade the plaintiff otherwise was in no sense negligent for the reasons referred to above. In short, it was for the plaintiff to decide whether to pursue a reconciliation with her husband and/or to seek to protect her interest in the matrimonial home, whether by lodgment of a caveat or proceedings in the Family Court, or both. As events transpired, the plaintiff made a wrong choice for which Ms Baker was in no sense responsible. The plaintiff must bear the consequences of her own actions and decisions.

[96] I consider that it is important to record that the attack on Ms Baker's professional integrity, competence and honesty was entirely groundless. I am satisfied that Ms Baker went beyond what would be expected of an ordinary reasonably prudent and careful solicitor in seeking to assist the plaintiff and protect her interests. If there way any error on her part, it was in not seeking to have the plaintiff's grant of legal aid cancelled in the face of the plaintiff's repeated refusals to accept advice which was given in her best interests. However, that does not provide any valid basis for a claim against NTLAC. The most charitable view that can be taken of the plaintiff's action is that it was born of her own confusion and

misunderstandings of her own making. I am reluctant to brand her a deliberate liar, particularly as English is not her first language – albeit she has lived in Australia for many years and for a good deal of that time with an Australian born husband. It is sufficient for present purposes to find that the plaintiff’s version of events lacks any credibility and must be rejected. On the other hand, I am entirely satisfied as to the truth and reliability of Ms Baker’s evidence and no adverse inference should be drawn against her by reason that she was the principal target of an unmeritorious action.

[97] For the reasons given earlier there will be judgment for the defendant against the plaintiff. I order the plaintiff to pay the defendant’s costs of the action, to be taxed in default of agreement.