[2005] WASCA 86

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	CLAIRS KEELEY (A FIRM) -v- TREACY & ORS [2005] WASCA 86
CORAM	**:**	STEYTLER P ROBERTS-SMITH JA MCLURE JA
HEARD	**:**	23 FEBRUARY 2005
DELIVERED	**:**	10 MAY 2005
FILE NO/S	**:**	FUL 114 of 2002
BETWEEN	**:**	CLAIRS KEELEY (A FIRM) Applicant (Sixth Defendant) AND JOANNE MARIE TREACY GEORGE ROBERT SOULLIER MARY JOY SOULLIER COLIN DOUGLAS HENNING DOREEN RUTH HENNING Respondents (Plaintiffs)

Catchwords:

Practice and procedure - Application to lift stay of proceedings - Maintenance and champerty - Whether change in circumstances since stay granted - Whether potential for abuse of process - Whether solicitors have a conflict of interest - Whether plaintiffs have been advised sufficiently of their position

Legislation:

Legal Practitioners Act 1893 (WA), s 59

Result:

Application granted

Category: B

Representation:

Counsel:

Applicant (Sixth Defendant)	:	Mr J T Gleeson SC & Mr S M Davies
Respondents (Plaintiffs)	:	Mr S J Gageler SC & Mr J C Giles

Solicitors:

Applicant (Sixth Defendant)	:	Mallesons Stephen Jaques
Respondents (Plaintiffs)	:	Solomon Brothers

Case(s) referred to in judgment(s):

Clairs Keeley (A Firm) v Treacy & Ors (2003) 28 WAR 139
Clairs Keeley (A Firm) v Treacy [2004] WASCA 277
Del Borrello v Friedman and Lurie (A Firm) [2001] WASCA 348
Law Society of New South Wales v Harvey [1976] 2 NSWLR 154
Treacy v Rylestone Pty Ltd [2002] WASC 178

Case(s) also cited:

Anfrank Nominees Pty Ltd v Connell (1991) 6 WAR 271
Boardman v Phipps [1967] 2 AC 46
Caldwell v Treloar (1982) 30 SASR 203
Collins v Westralian Sands Ltd (1993) 9 WAR 56
Commonwealth Bank of Australia v Smith (1991) 42 FCR 390
Cutter v Powell [1795] 101 ER 573
Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd [2005] NSWCA 83

Lawrence v Potts (1834) 6 C & P 428
MacGuire & Tansey v Makaronis (1997) 188 CLR 449
Moody v Cox [1917] 2 Ch 71
Phipps v Boardman [1964] 2 All ER 187
Spellson v George (1992) 26 NSWLR 666
Stobbart v Mocnaj [1999] WASC 252
Walmsley v Consentino [2001] NSWCA 403
Wan v McDonald (1992) 33 FCR 491

1 **JUDGMENT OF THE COURT**: On 3 December 2003 the Court by a majority (Parker, Templeman, Wheeler and Pullin JJ, Murray J dissenting) ordered the stay of an action brought by Joanne Marie Treacy and others (the "plaintiffs") against their former solicitors, Clairs Keeley: ***Clairs Keeley (A Firm) v Treacy & Ors*** (2003) 28 WAR 139 ("***Clairs Keeley No 1***"). The action was stayed on the ground that it was champertously maintained and an abuse of the process of the Court.

2 On 25 November 2004 the Court (Steytler, Templeman, McKechnie JJ) dismissed the plaintiffs' application to lift the stay: ***Clairs Keeley (A Firm) v Treacy*** [2004] WASCA 277 ("***Clairs Keeley No 2***"). There is now a further application by the plaintiffs before the Court to lift the stay. As on the previous occasion, we shall use the nomenclature of the previous judgments and refer to Clairs Keeley by that name in order to avoid confusion. Further, these reasons should be regarded as supplementary to those given in ***Clairs Keeley Nos 1 and 2***.

3 At all times, Solomon Brothers have been the solicitors on the record for the plaintiffs in the action against Clairs Keeley. At some stage after it commenced, the plaintiffs entered into a funding agreement with a litigation funder, Insolvency Litigation Fund Pty Ltd, a subsidiary of Insolvency Management Ltd ("IMF"). For consistency and convenience we will refer to the funder as IMF. IMF, for itself and purportedly on behalf of the plaintiffs, and Solomon Brothers entered into a retainer agreement. The performance of IMF and Solomon Brothers in connection with the funding and retainer agreements was the basis for the grant of the stay.

4 IMF is funding a large number of other finance-broking related actions in this Court, the centrepiece of which is an action by more than 3000 plaintiffs against the Finance Brokers Supervisory Board ("Board action"). The plaintiffs in the Clairs Keeley action are also plaintiffs in the Board action.

5 Following the grant of the stay, IMF and Solomon Brothers produced a document described as a Supplemental Agreement that varied the funding agreement and acknowledged changes to the retainer agreement, one of which was that it be made directly between Solomon Brothers and the plaintiffs. The amendments to the retainer agreement are set out in a circular letter dated December 2003 from Solomon Brothers to the plaintiffs and their other finance-broking clients. Solomon Brothers had also obtained an opinion from Mr McKerracher QC relating to the proposed amendments to the existing agreements. Solomon Brothers'

circular letter, the Supplemental Agreement, Mr McKerracher's opinion and a circular letter from Mr Hugh McLernon on behalf of IMF were forwarded to the clients in December 2003.

6 Affidavits of Jasmine Bartley, Hugh McLernon and Elizabeth Swift containing evidence not previously available were tendered in this application without objection.

7 Following the dismissal of the first application to lift the stay, Solomon Brothers again wrote to the plaintiffs and other clients in December 2004 enclosing a Direction and Acceptance Form ("Direction") which has been signed by the plaintiffs and which indicates they wish to proceed with the actions in which they are currently plaintiffs with Solomon Brothers as their solicitors and with funding from IMF.

8 The plaintiffs rely on the contents of the December 2004 letter and the Direction in support of their application to lift the stay. Clairs Keeley opposed the application on the basis that the concerns expressed by the Court in ***Clairs Keeley Nos 1 and 2*** have not been adequately addressed. We propose to consider those concerns by reference to the agreements and relevant communications.

Funding Agreement

9 The majority in ***Clairs Keeley No 1*** was concerned that the funding agreement operated as a *de facto* assignment to IMF of the plaintiffs' causes of action. The basis for that concern was the extent of the control or potential for the exercise of control by Mr McLernon on behalf of the funder with the plaintiffs reduced to mere ciphers. The Court was also critical of particular aspects of the funding agreement, including a clause to the effect that if the claim was settled on terms which were unacceptable to IMF and which an independent Queen's Counsel also regarded as inadequate, the amount of commission payable by the plaintiffs to IMF would be increased from 35 to 45 per cent. Further, one seventh of the 35 per cent commission payable by the client to IMF would be paid by IMF to RECA, the body that had introduced the plaintiffs to IMF. These features of the funding agreement were deleted by the Supplemental Agreement.

10 The Supplemental Agreement also provided that the plaintiffs would themselves appoint Solomon Brothers as their solicitors and that IMF's role and conduct would be governed by the terms of the new retainer.

11 The Court in ***Clairs Keeley No 2*** noted that there remained a question as to how the plaintiffs would be charged for the costs of any unsuccessful interlocutory applications brought in their names or how the various substantial expenses incurred by IMF in relation to its finance-broking clients would be apportioned [51]. Further, the Court said it was implicit in the conclusion in ***Clairs Keeley No 1*** that the funding agreement was a *de facto* assignment, that it was unenforceable and noted the Supplemental Agreement was drawn on the basis the funding agreement was valid [46].

Retainer Agreement

12 We start with the original retainer agreement. IMF purported to enter into the retainer agreement as agent for the plaintiffs. Until December 2003 the plaintiffs were unaware of the existence or content of the retainer agreement. It is comprised by a letter dated 31 July 2001 from Solomon Brothers to IMF read with Solomon Brothers' standard 2001 Terms of Engagement. The Terms of Engagement provide that Solomon Brothers charge by reference to time spent by their professional staff in accordance with standard hourly rates. The retainer agreement provided for Solomon Brothers to charge 20 per cent below their standard hourly rates unless and until IMF recovered under its funding agreement all costs and expenses incurred in achieving that recovery, in which event Solomon Brothers would adjust their fees from inception to 25 per cent above the standard rates. They also agreed not to amend their hourly rate until the claims against the Board had been finalised without the consent of IMF.

13 The majority in ***Clairs Keeley No 1*** held that IMF's authority was limited to engaging Solomon Brothers upon terms that they would charge on the scale applicable to the work they undertook and that Solomon Brothers were in breach of their fiduciary duty to the plaintiffs in failing to disclose the arrangements made on their behalf and to advise them that it was contrary to their interests to pay above the scale.

14 The Judge at first instance, Scott J, was critical of the fact that the plaintiffs had not been informed about the 25 per cent uplift. Without reference to the plaintiffs, IMF and Solomon Brothers sought to overcome the problem by agreeing that the plaintiffs would be responsible for 100 per cent of Solomon Brothers' usual fees and that IMF would be responsible for the 25 per cent uplift. The majority in ***Clairs Keeley No 1*** concluded that Solomon Brothers had placed themselves in a position of conflict, or potential conflict, with their respective clients in agreeing to

this variation because IMF's commercial interest in pursuing or settling the action might not have coincided with the clients' interest.

15 In the circular letter of December 2003 Solomon Brothers purported to explain the fact and basis for the Court's criticisms in ***Clairs Keeley No 1***. In doing so, they made misleading statements and omitted to inform the plaintiffs that because the retainer agreement had not been approved or ratified, it was unenforceable. The Court in ***Clairs Keeley No 2*** observed:

> "… Solomon Brothers had no interest in providing such advice because if the plaintiffs had elected not to continue with the action, or to continue with other solicitors, Solomon Brothers would have lost the opportunity of earning very substantial fees from this litigation. It was therefore in Solomon Brothers' interest to encourage the plaintiffs to enter into new agreements which would preserve their … position by apparently ratifying the previous agreements".

16 The revisions to the retainer agreement are set out in Solomon Brothers' circular letter of December 2003. Firstly, as previously noted, the retainer was to be directly between the plaintiffs and Solomon Brothers. Secondly, the terms of the revised retainer were as contained in the original retainer letter (as varied by the December 2003 letter) together with an updated 2003 version of their standard Terms of Engagement. Thirdly, the revised retainer was to apply from 3 December 2003. The terms of the revised retainer relating to control are set out in the judgment in ***Clairs Keeley No 2***. It is convenient to repeat them here. The letter provides:

> "4. Day to day conduct of litigation involves various decisions. Those decisions usually involve the exercise of professional judgment. Many, and perhaps most, of those decisions have no real impact on the outcome of the litigation. It is impractical to take instructions from all of our approximately 3,000 clients in relation to each decision. It is not unusual for lawyers to make decisions, even where there are only one or two clients in a matter. For example, during any hearing counsel must make instantaneous decisions, involving the exercise of discretion and judgment, as to how to pursue an argument or as to witnesses to be called or the questions to be asked in cross-examination. Such decisions, unlike many made

during pre-trial conduct of litigation, can sometimes significantly affect the outcome of an action. Consequently, by this agreement you direct us:-

4.1 Subject to 4.2 below to make decisions in relation to the conduct of litigation you are party to and which is funded by IMF, unless the decision to be made is, in our reasonable opinion, such that it is necessary (as the decision may have a material impact on your commercial recovery from the litigation) and practical to take express instructions from you first. By doing so, you instruct us to make decisions within that category of decision, and to act on those decisions in the conduct of the relevant litigation, as we reasonably regard as being in your best interests;

4.2 In relation to matters which are likely to have a significant impact on either the possible result of the litigation or the commercial outcome of the litigation to you, to seek express instructions from you unless impossible to do so. However, other than with respect to settlement or settlement proposals, we are to act in accordance with the instructions given by a majority of the plaintiffs for whom we act in the relevant action;

4.3 Although we cannot foresee a situation where taking direct instructions will be impossible, should such a situation arise you instruct us to act as we reasonably consider is in your best interests;

4.4 In relation to any settlement proposal, the decision to accept, reject or make a proposal is entirely your decision. We are to seek your instructions in relation to any settlement proposal. You will not be bound by the views or instructions of any of our other clients, or IMF concerning any settlement proposal;

4.5 To report to you (whether in writing or orally) as follows:-

4.5.1 when a matter which is likely to affect your commercial return from the litigation occurs, or we require your express instructions as provided for in paragraphs 4.1, 4.2 and 4.4 above;

4.5.2 in any event, no less often than every three months. We have chosen a period of three months as, from time to time, there are long periods in litigation where either little occurs or during which very time consuming tasks are undertaken without a final result. For example, the process of providing the Finance Brokers Supervisory Board's solicitors with a list of files of documents relevant to that action took a number of months;

4.5.3 the report will recite steps taken in the litigation on your behalf, and progress which has been made."

17 The Court in ***Clairs Keeley No 2*** stated that:

> "… the proper implementation of the [revised] retainer agreement will depend to a considerable extent on the professionalism and objectivity of Solomon Brothers, and the plaintiffs' full understanding of their respective positions".

Mr McKerracher's Opinion and Mr McLernon's Letter

18 Solomon Brothers' instructions to Mr McKerracher were confined to whether the clients would be prejudiced in any way under the proposed new arrangements. The Court in ***Clairs Keeley No 2*** regarded Solomon Brothers' instructions as inappropriate. It said the plaintiffs should have been advised that the costs agreement with Solomon Brothers was unenforceable; the funding agreement probably so; what the plaintiffs' available options were; and that Solomon Brothers were in breach of their fiduciary duty to the plaintiffs.

19 The Court was also critical of aspects of Mr McKerracher's advice, including an assertion that it would have been open to Solomon Brothers to charge each of their clients on scale and that the basis on which Solomon Brothers charged fees was academic as they were paid by IMF.

Of course, in the event the plaintiffs were successful, Solomon Brothers' fees would be recouped from the judgment or settlement sum.

20 The Court concluded that Mr McLernon's letter contained an inaccurate and misleading summary of the decision of the Full Court. Further, Mr McLernon advised that the changes to the agreements were "clearly to the benefit of each client", but failed to mention that IMF and Solomon Brothers probably stood to gain more than the plaintiffs.

21 The Court in ***Clairs Keeley No 2*** concluded as follows:

> "125 … it is necessary to balance the competing interests in the course of assessing that risk to the due administration of justice which has been introduced by the funding arrangements. In seeking that balance one important consideration should, we think, be whether or not the litigation is, in truth, still that of the plaintiff or defendant. That is to say, the funded party should still be in a position to benefit from a successful outcome and should be entitled to make informed decisions which are critical to the litigation. If the funder's level of control is such that, in reality, it will be making decisions of that kind, or even if the funded parties are not to be given sufficient information to enable them properly to make decisions of that kind, there will be a substantial risk that the funder's intervention will be inimical to the due administration of justice and that the Court's processes will be misused for commercial gain.
>
> …
>
> 132 The question for the Court, in conducting the balancing exercise referred to above, is whether the degree of control which IMF is capable of exercising (in law and in fact) is such as to give rise to an unacceptable risk of abuse of the Court's processes, and is therefore, contrary to the public interest.
>
> 133 We would have been prepared to accept the risk if it was clear that the plaintiffs had made a fully informed decision to proceed with IMF and Solomon Brothers; and if Solomon Brothers had demonstrated a fuller appreciation of their obligations to the plaintiffs.

134 Regrettably, we are not confident this is so. It is clear that the plaintiffs have not been fully informed about their options or, for that matter, about the decision of the Full Court which closely affected their rights and obligations. Nor is it apparent that Solomon Brothers have themselves understood the consequences of their breach of fiduciary obligations found by the Full Court and their obligations which follow from those consequences.

135 That being so, we would not be prepared to lift the stay unless and until the Court could be satisfied of these matters. That is to say, we would be minded to lift the stay only if satisfied that Solomon Brothers had demonstrated a fuller understanding of their obligations to their clients and that the plaintiffs had been fully informed of their options which follow from the decision of the Full Court (even if it is under challenge), of the shortcomings in the instructions given to Mr McKerracher and of the errors and omissions in the letters from IMF and Solomon Brothers respectively. The plaintiffs should also be told, again, of the importance of obtaining independent advice in respect of these matters. If the plaintiffs were minded, with the benefit of full information and advice, to continue with the present arrangements, we would be prepared to lift the stay, but not otherwise."

Post Clairs Keeley No 2

22 On 25 November 2004 Solomon Brothers provided senior counsel, Mr Gageler, with a copy of the reasons in ***Clairs Keeley No 2*** and sought his advice on, *inter alia*, who should write to the clients in the terms suggested by the Full Court, the content of the letter and whether the plaintiffs engaging a firm of solicitors other than Solomon Brothers was a preferable option. Subsequently, Solomon Brothers prepared a draft letter to the plaintiffs that was settled by senior counsel. The settled letter, dated 16 December 2004, was forwarded to the plaintiffs. The letter details the Full Court's findings in ***Clairs Keeley No 2*** and Solomon Brothers' failures. It includes the following:

> "The Full Court found that we breached our fiduciary duty to you and failed to provide adequate information to you as follows:

1. By entering into a costs agreement with IMF instead of directly with you. The Full Court in its earlier decision held that IMF could not agree on your behalf to pay the fees we charged. A consequence of that holding was that your original engagement of us by IMF could not be enforced by us. We either had no entitlement to remuneration from you or our remuneration was limited to the Supreme Court Scale.

2. By failing to advise you that our fees were not limited to the Supreme Court Scale. While both we and Mr McKerracher QC thought that our fees may well be below Supreme Court Scale, the recent Full Court has disagreed and held that our fees will almost certainly exceed the Supreme Court Scale. As noted below our fees are, as with most other practitioners who practise in the field of commercial litigation, charged at an hourly rate and not limited to the Supreme Court Scale.

3. By originally agreeing with IMF to discount our fees to 80% of usual fees until recovery with an uplift of 125% of our usual fees on recovery. We committed a breach of fiduciary duty, first by not informing you of that arrangement and secondly because that arrangement placed us in a position of conflict or potential conflict with you due to our interest in the outcome of the action.

4. A consequence of points 1, 2 and 3 above was that it was wrong of us to say that, by you agreeing to our new retainer and the new IMF funding agreement, you would be benefited. What we failed to inform you of was that, unless you entered into the new agreement and ratified our right to remuneration for work performed since you engaged us in relation to the above litigation, we were either entitled to no remuneration or remuneration limited to scale.

It is important that you be aware that the consequence of the Full Court's decision is that, like the original retainer agreement entered into through IMF, the retainer agreement you entered into with us last December is unenforceable. As things currently stand, we either have no entitlement to remuneration

from you or our remuneration is limited to the Supreme Court Scale."

23 In addition, the letter:

(a) states that the funding agreement with IMF, both in its original and amended forms, is unenforceable against the plaintiffs by IMF;

(b) advises of the consequence of ratifying the retainer and how it compares with the scale;

(c) identifies three options for the future, being, firstly, discontinuing the Clairs Keeley and finance brokers' actions; secondly, continuing the actions at their own expense either with new solicitors or in person; thirdly, continuing the actions with Solomon Brothers acting for them and with funding by IMF;

(d) states that it was important that the plaintiffs obtain independent legal advice as to how to proceed.

24 The letter concludes:

"We attach a form for you to complete directing us and IMF how to proceed. … If you wish us to continue acting for you, with funding by IMF, please complete that form and return it to us.

By returning the form, you ratify the earlier funding agreement you entered into with IMF, as was attempted to be varied in December last year, as varied by this letter. You also ratify the retainer you have entered into with us, as varied by this letter …".

25 The Direction is in the following form:

"**DIRECTION AND ACCEPTANCE FORM**

Client ID: 1093

To: Solomon Brothers

And to: Insolvency Litigation Fund Pty Ltd

❑ I/We wish to proceed with the actions in which I/We are currently plaintiff with Solomon Brothers as my/our solicitors and with funding from Insolvency Litigation Fund Pty Ltd;

❑ I/We wish to discontinue the actions in which I/we are plaintiff funded by Insolvency Litigation Fund Pty Ltd;

❑ I/We wish to appoint new solicitors and/or act in person without funding from Insolvency Litigation Fund Pty Ltd

Please tick whichever is appropriate"

26 Clairs Keeley opposed the application to lift the stay on five grounds. They are, first, that Solomon Brothers have not shown they now have a full and proper understanding of their obligations as fiduciaries. Second, their December 2004 letter ("Letter") does not provide a full explanation of all the options open to the plaintiffs. Third, the Letter contains misrepresentations and material omissions. Fourth, there is no evidence that the plaintiffs obtained independent advice. Finally, there was no material change in the circumstances that resulted in the grant of the stay. Some of the grounds overlap.

Solomon Brothers' Level of Understanding of Their Obligations and the Plaintiffs' Failure to Obtain Independent Advice

27 Clairs Keeley relies on four matters, being the failure to mention the option of continuing with IMF but with different solicitors, a claimed breach of what is described as the self-dealing rule, a lack of fully

informed consent from the plaintiffs and, lastly, Solomon Brothers' failure to ensure the plaintiffs obtained independent advice.

28 The Letter does not refer to, and the Direction does not give the plaintiffs, the option of continuing with funding from IMF but with different solicitors. However, that option was not made available by IMF. Mr McLernon deposed to the fact that following publication of ***Clairs Keeley No 2*** and discussion with other directors of IMF he decided that, unless it was impossible for the finance-broker litigation to proceed with Solomon Brothers acting as solicitors for IMF's finance-broking litigation clients, IMF would not offer litigation funding to those clients with any other solicitors. His reasons for that decision include the fact that the Court in ***Clairs Keeley No 2*** had stated that if the plaintiffs wished to continue with their current solicitors, having received full information and advice, the Court would be minded to dissolve the stay; the practical difficulties in having IMF's clients represented by different firms of solicitors appeared insurmountable (having regard to the multiple finance-broking actions and the Board action); and none of IMF's clients had expressed dissatisfaction with Solomon Brothers or a wish to change solicitors.

29 For the purposes of the application to lift the stay, the important point is that the Court in ***Clairs Keeley No 2*** expressly left open the possibility of Solomon Brothers continuing to act for the plaintiffs if they were fully informed of relevant matters (being the options which follow from the Full Court decisions, the shortcomings in the instructions given to Mr McKerracher, the errors and omissions in the December 2003 letters from IMF and Solomon Brothers and of the importance of obtaining independent advice) and Solomon Brothers demonstrated a fuller understanding of their obligations to their clients. It is implicit in the decision in ***Clairs Keeley No 2*** that nothing in the conduct of IMF or Solomon Brothers to that date necessarily disqualified Solomon Brothers from continuing to act as the solicitors for the plaintiffs.

30 IMF was entitled to formulate a position on whether it would continue to fund the litigation with other solicitors and it supported its decision on reasonable grounds. However, the real question is whether Solomon Brothers should have advised the plaintiffs of all the available and potential options, including those that may only become available as a result of a negotiated arrangement with IMF. The answer to that question depends on the role Solomon Brothers was playing. On a proper construction of the Letter, Solomon Brothers was not advising the plaintiffs on a matter within the scope of their retainer. Rather, they were,

in accordance with what was contemplated by the Court in ***Clairs Keeley No 2***, informing the plaintiffs of their earlier errors and omissions and of the available options. Solomon Brothers clearly could not advise the plaintiffs on the course they could or should take on the matters raised in the Letter. So much must have been apparent to the plaintiffs from the content of the Letter and the repeated recommendation that they obtain legal advice.

31 Clairs Keeley also relies on the content of a communication between Solomon Brothers and Mr Gageler SC on the subject of new solicitors as demonstrating a lack of understanding of their obligations. In a letter dated 25 November 2004 Solomon Brothers sought counsel's advice on whether the alternative of the plaintiffs engaging a firm of solicitors other than Solomon Brothers was preferable. They mention two factors, the second being that there would be a very large cost to the plaintiffs by changing firms, followed by a reference to Solomon Brothers' fees already exceeding $1,000,000 and the firm's extensive background knowledge "with respect to the huge volume of fact". The content of senior counsel's advice on this matter is not directly disclosed.

32 However, whatever be the position at the time Solomon Brothers wrote to senior counsel, it is clear that by the time of their Letter they were aware that, as things stood, they had no entitlement to remuneration from the plaintiffs or their remuneration was limited to the scale. Further, the Letter recognises that, if the plaintiffs wished to change solicitors, they should not bear any costs associated with doing so. We are not persuaded there is any merit in this ground of opposition.

33 The nub of the self-dealing submission is that the Letter amounts to a rolled up soliciting of a funding agreement for IMF and a costs agreement for Solomon Brothers together with "purported advice to the respondents on their options and reporting on the Full Court's decision". The word "soliciting" does not fairly characterise the contents or tone of the Letter. After informing the plaintiffs of the Full Court's conclusion that the retainer agreement was unenforceable and the funding agreement probably so, the Letter identifies the available options and requests the plaintiffs to make an election. It is the case that one of the options (continuation of the *status quo*) is to the very significant financial advantage of Solomon Brothers and possibly to IMF. However, the consequence of electing the *status quo*, being ratification of the unenforceable agreements, is clearly identified and the Letter repeatedly states that it is important that the plaintiffs obtain independent legal advice. It is said the Letter sought absolution for past breaches of

fiduciary duty. The terms of the Letter do not support that construction and such an intention was disavowed on behalf of Solomon Brothers and IMF.

34 It is sufficiently clear from the content of the Letter that Solomon Brothers is writing on behalf of IMF and itself and not in its capacity as solicitors advising the plaintiffs.

35 Clairs Keeley contends that it would have been possible to engage an independent party to communicate the information to the plaintiffs. It seems what is suggested is that the funder and Solomon Brothers should have retained an independent third party to inform the plaintiffs of the nature and consequences of the findings of the Court in ***Clairs Keeley Nos 1 and 2*** and advise them of and concerning the (available and potential) options open to the plaintiffs. That goes beyond what the Court in ***Clairs Keeley No 2*** contemplated, which was that the plaintiffs be told again of the importance of them obtaining independent advice.

36 Clairs Keeley also rely on the proposition in ***Law Society of New South Wales v Harvey*** [1976] 2 NSWLR 154 at 170 per Street CJ that a solicitor shall not in any way whatever, in respect of any transaction in the relations between him and his client, make gain for himself at the expense of his client, beyond the amount of just and fair professional remuneration to which he is entitled. ***Harvey*** was a case in which a solicitor made loans on behalf of clients or advised clients to make loans to companies in which the solicitor was a director and shareholder. That is clearly distinguishable from the present case. Firstly, the Letter relates to Solomon Brothers' remuneration for acting in the litigation and, as already noted, it would be apparent to the plaintiffs that Solomon Brothers were writing on behalf of IMF and themselves. We are not persuaded that involves an actual or potential conflict of interest or a disqualifying conflict of interest that of itself would entitle a stranger to a retainer agreement preventing the solicitors from acting for its opponent. The central issue before this Court is whether Solomon Brothers understand the nature and extent of their duties to the plaintiffs in the conduct of the litigation having regard to their pivotal role in preventing an inappropriate level of control of the litigation by IMF. As stated by the Court in ***Clairs Keeley No 2***, the effectiveness of the variations to the retainer agreement depend upon Solomon Brothers having a proper understanding of that role.

37 It follows that we do not accept Clairs Keeley's submission that the conflicts of interest between Solomon Brothers and the plaintiffs and IMF

and the plaintiffs are impossible to untangle. If that is correct, it would also have been the case at the time ***Clairs Keeley No 2*** was heard. The submission is inconsistent with that Court's conclusions. In any event, the submission appears to be based on a proposition that Solomon Brothers is legally exposed to IMF for any damage suffered by IMF as a result of matters arising from and related to the stay. There is insufficient material before the Court to justify that conclusion.

38 The gravamen of the complaint on lack of fully informed consent is that Solomon Brothers did not reveal that "in respect to the dealings being solicited in the letter itself Solomon Brothers had a further conflict of interest or the nature and extent of that interest". For the reasons already given, we are not satisfied there was a further conflict. Even if there was, it is clear from the terms of the Letter that the interests of IMF and Solomon Brothers, on the one hand, and the plaintiffs, on the other, could be at odds and would be directly affected by the plaintiffs' election. There is sufficient information in the Letter from which it should be clearly apparent to the plaintiffs that Solomon Brothers had good grounds for the repeated recommendation to obtain independent advice.

39 Clairs Keeley also contended that Solomon Brothers should have advised the plaintiffs that they must obtain independent legal advice before Solomon Brothers could continue to act. That goes beyond what the Court in ***Clairs Keeley No 2*** required of Solomon Brothers. These are very unusual circumstances. It must have been abundantly clear to the plaintiffs from the Court's decision to stay the action and its adverse findings against IMF and Solomon Brothers in ***Clairs Keeley No 1*** and ***Clairs Keeley No 2*** referred to in the Letter that it would be in their best interests to obtain independent legal advice. In those circumstances, we would not refuse to lift the stay simply because the plaintiffs have chosen to ignore the recommendation.

Adequacy of Explanation of the Options

40 We have already dealt with the complaint that the option of IMF funding the action with different solicitors was not available.

41 Clairs Keeley also contended that Solomon Brothers should have explained in the Letter that they were obliged to act in the litigation until completion of the matter and render fees at scale. That submission is based on the proposition that a solicitor's retainer is an entire contract, one which is not supported by modern authority in this State: ***Del Borrello v Friedman and Lurie (A Firm)*** [2001] WASCA 348 at [67] - [69] per Kennedy J. However, it is unnecessary to determine the question.

Solomon Brothers were not obliged to advise the plaintiffs of an arguable proposition, particularly when they recommended that the plaintiffs obtain independent legal advice.

42 Complaint is also made that the Letter contained no explanation of the possibility of the plaintiffs obtaining funding from the Legal Aid Commission. We infer they mean funding of the Clairs Keeley action. It is erroneous to focus solely on the Clairs Keeley action. The funding agreement relates to all recovery actions, including the Board action. It is clear the funder's participation in the funding arrangement is predicated on multiple recovery actions. Further, it appears that Scott J at first instance (***Treacy v Rylestone Pty Ltd*** [2002] WASC 178 at [71] - [72]) concluded that legal aid was not available for the plaintiffs because they were also plaintiffs in the Board action. In any event, the submission (and those following that relate to alternative sources of funding) is based on the incorrect premise that Solomon Brothers has assumed the responsibility to advise the plaintiffs as to all potential options.

43 Clairs Keeley also complains that there is no explanation of the possibility of the plaintiffs pooling a contribution to fund the litigation, including the Board action. The evidence accepted at first instance was that the respondents could not afford to pursue their actions without funding by IMF (***Clairs Keeley No 2*** at [119]). There is also no mention of the possibility of other solicitors being prepared to act for scale or on the basis that no fees will be charged until the end of the matter. However, there is no evidence that any of these are viable options.

44 It is also said there is no adequate explanation of the extent to which the plaintiffs are ratifying matters that have occurred in the past as distinct from agreeing matters for the future. We disagree. The Letter explains the effect of returning the Direction as constituting a ratification of the funding agreement and the retainer agreement. The consequences of ratification are then explained. If the plaintiffs had any doubts, Solomon Brothers repeated their statement that the plaintiffs should obtain independent legal advice.

45 Clairs Keeley also contend the statement of the options in the Letter encourages the plaintiffs to elect the *status quo* as the most simple and beneficial way forward for the plaintiffs. That may be the practical effect of the description of the options. However, it is not suggested that the description is inaccurate or unbalanced. There is no merit in this complaint.

46 The next complaint is that Solomon Brothers do not inform the plaintiffs of the matters set out at r 16A(1) of the *Professional Conduct Rules* which provides that the solicitor shall provide his client with a written statement setting out the basis for calculating his professional costs, disbursements, the client's right to receive a bill of costs, the billing arrangements, the provision of s 59 of the *Legal Practitioners Act* and the client's right to a review of costs by taxation. Compliance with this professional conduct rule is outside the scope of the issues of concern to the Court. In any event, the retainer agreement (the original and as varied) deals with all matters save for s 59 of the now repealed *Legal Practitioners Act 1893* (WA) and a client's right to a review of costs by taxation.

47 Finally, it is said the Letter gives the clear impression that the Clairs Keeley action and the finance brokers' action are linked. The impression is correct because IMF funding is linked as is clear from the terms of the funding agreement as varied.

Further Misrepresentations and Material Omissions

48 The majority of the matters raised by Clairs Keeley are said to be material omissions from the Letter. They are, first, the omission of the statement by the Full Court in ***Clairs Keeley No 2*** that the plaintiffs have the benefit of not only full information but also advice about their options. The Court required that the plaintiffs be fully informed of their options and be told of the importance of obtaining independent advice in respect of that and other matters. Solomon Brothers identified the available options but recognised that they were unable to give advice and recommended the plaintiffs obtain independent advice. That is sufficient in the circumstances.

49 Second is the failure to refer to the Court's finding that IMF misled the plaintiffs and wrongly purported to give them legal advice. The Letter informed the plaintiffs that the information provided by both Solomon Brothers and IMF previously was inaccurate and incomplete. That is adequate.

50 Next is the omission to inform the plaintiffs that the Court found the opinion of Mr McKerracher QC to be misleading. Solomon Brothers informed the plaintiffs that the Court disagreed with Mr McKerracher's opinion and that the instructions given to him were too narrow. Further, the plaintiffs were informed that they should not be discouraged from obtaining independent advice by having received Mr McKerracher's advice. The information supplied was sufficient.

51 Solomon Brothers did not provide the plaintiffs with a copy of the Court's reasons in ***Clairs Keeley No 1*** or ***Clairs Keeley Nos 2***. However, they provided the plaintiffs with an internet address for obtaining the judgments and offered to provide a hard copy if requested. That is adequate.

52 Solomon Brothers also omitted to inform the respondents how costs incurred in all matters the subject of IMF's funding arrangements would be apportioned between the matters. The Court in ***Clairs Keeley Nos 2*** noted that the question had not been addressed. However, it is not referred to in the Court's summary of matters that had to be attended to before it would be prepared to lift the stay. Although this should be a matter of very significant interest (and concern) to the plaintiffs and has received inadequate attention to date, the omission is not sufficient to prevent the lifting of the stay.

53 Next, it is said Solomon Brothers omitted to inform the plaintiffs of the proposed hourly rates under the new retainer agreement or to inform them of the hourly rates under the scale. This information was provided in December 2003. That is sufficient.

54 Solomon Brothers also failed to inform the plaintiffs of the costs incurred to the date of the Letter, the plaintiffs' likely return if the proceedings were successful, the return to Solomon Brothers if the new agreements were signed and what the return to IMF would be if the new agreements were signed. This relates to the variations to the original funding and retainer agreements. This information was not expressly sought by the Court in ***Clairs Keeley No 2*** and in those circumstances is not, in my view, a material omission. In any event, information was provided to explain the basis of the calculation of the return to IMF, Solomon Brothers and the plaintiffs. We accept the submission that the future benefit to the plaintiffs is incapable of precise calculation.

55 The next complaint is Solomon Brothers' failure to explain what is meant by them breaching their "fiduciary" duties. The description of the conduct constituting the breaches together with a recommendation that the plaintiffs obtain independent legal advice is adequate.

56 It is then said there is no explanation or differentiation between agreeing matters for the future and ratification of fees charged in the past. For the reasons already given, there is no merit in this complaint insofar as it applies to Solomon Brothers. The same complaint is made in relation to IMF. The Letter makes it clear that by returning the Direction the

plaintiffs ratify the funding agreements and the consequences, past and future, in relation thereto. There is no merit in this complaint.

57 The penultimate complaint relates to the tick-a-box form of the Direction which it is said failed to provide the plaintiffs with all options, linked the plaintiffs' access to funding with the retainer of Solomon Brothers and failed to record that ticking the box to retain the *status quo* would amount to ratification. These matters have been dealt with earlier. For the reasons already given, there is no merit in this complaint.

58 Finally, it is said the manner of communication with the plaintiffs was unsatisfactory in that no composite document was prepared setting out all of the terms governing the relationship. Whilst that may be so, all of the relevant information was provided with recommendations that independent advice be obtained. That is sufficient.

No Material Change in Circumstances

59 In substance, Clairs Keeley seek to relitigate the issues canvassed in the first application to lift the stay. These matters were carefully considered in ***Clairs Keeley No 2*** and the Court's conclusions unambiguously stated. The variations to the funding agreement and the retainer agreement were adequate provided Solomon Brothers demonstrated the requisite professionalism and objectivity to ensure the proper implementation of the revised retainer agreement and the plaintiffs had a full understanding of their position.

60 The Court in ***Clairs Keeley No 2*** identified at [135] what it required before it would be prepared to lift the stay. The plaintiffs have now been sufficiently advised of all relevant matters. They must bear the consequence of any failure by them to obtain independent advice. We are also satisfied that Solomon Brothers has demonstrated a fuller understanding of their obligations to the plaintiffs. Any failure by them, past or future, will no doubt be the subject of further litigation if the plaintiffs' interests are adversely affected (because they have tied their potential exposure for the various defendants' costs to the financial viability of the funder) or their expectations unmet. Notwithstanding the conduct of Solomon Brothers and IMF to date, of which the plaintiffs have been fully informed, they wish to continue with the present arrangements. That being the case, we would lift the stay.