

Professional Advisers - Duty of Care

Beneficial Finance Corporation Ltd v ABW Nominees Pty Ltd & R K Johnson, unreported, Federal Court of Australia, Drummond J, 16 May 1996.

The Federal Court in *Beneficial Finance Corporation Ltd v ABW Nominees Pty Ltd & R K Johnson* held that when a professional adviser such as quantity surveyors are asked to give advice to a client, they are required to give their honest opinion.

It is not an option to give an opinion that they do not believe to be reliable, without clearly flagging that belief. Such an opinion is misleading because it is not the adviser's honest opinion.

Background

Beneficial Finance Corporation ("BFC") agreed to lend a builder, JC Scott Development Pty Ltd, some money subject to certain conditions. Johnson, of Butler Wright & Partners ("BWP"), was a quantity surveyor. For various reasons, he gave a misleading estimate of construction costs to Newbold, the BFC account manager who was responsible for processing the builder's loan application and administering the loan facility.

Over time, BFC varied certain of the original offer conditions and permitted the builder to draw down the whole of the loan other than the construction finance component, even though certain conditions had not been satisfied. Later, the builder drew further sums against this component of the facility. BFC also increased the amount of the loan facility and made additional money available to the builder.

Financial Difficulties Encountered

The builder did not follow normal procedures in carrying out work on the project and ran into financial difficulties early on. Eventually, BFC appointed a receiver and manager to the builder, took the remaining work out of its hands and let the contract to another builder, who completed the project.

After realising its primary security by selling the units in the completed project and various collateral securities, BFC incurred an overall loss on the project and sought to recover this sum from BWP and Johnson.

Justice Drummond's Assessment

Justice Drummond held that there were two bases on which he thought Johnson and, through him, BWP were liable for the full amount claimed by BFC.

With Johnson's belief that construction costs were likely to substantially exceed the builder's estimate and the figure beyond which he was told BFC would not

advance money, it was according to the judge, *readily foreseeable* by Johnson that the release of loan money to the builder might involve the release of funds to a project that was likely to fail. The judge felt that by giving Newbold, against this set of known circumstances, the misleading estimate, Johnson generated the risk that BFC would release loan money to the builder in circumstances in which BFC might suffer a loss.

Johnson's default in providing Newbold with an inaccurate estimate of costs was causally related to BFC's loss, since, if Johnson had provided his honest estimate, BFC would not have proceeded with the transaction. BFC would still not have suffered the losses in question unless Newbold broke his duty of fidelity to BFC, and Ahrens (Newbold's superior) also neglected his duty of care to BFC (which Newbold and Ahrens both did in ignoring the loan conditions set by BFC's head office). All three defaults were necessary before BFC could suffer the loss it did. Each of the three defaults played a necessary part in causing the damage to BFC for which is sued. Since Johnson's default was a cause of BFC's losses, it did not matter that it would not, by itself, have been sufficient to ensure BFC suffer those losses. They could all be recovered from BWP and Johnson.

Duty of Professional Advisers

Justice Drummond went on to say that a professional adviser cannot give to his client, when requested to do so, an opinion on a matter important to the client that he does not believe to be reliable, without clearly flagging that belief. Carefully worded qualifications to such an opinion will rarely be sufficient to prevent the qualified opinion being misleading. In the judge's view, such an opinion is misleading simply because it is not the adviser's honest opinion.

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