Short Minutes Transcript: Usual Practice – Is It Good Enough?

Your purchaser client has failed to complete the contract resulting in a claim by the vendor for forfeiture of the deposit and damages for a deficiency on resale. Your client has cross-claimed against you alleging a failure to advise on the zoning of adjoining properties.

When explaining the contract your usual practice is to say words to the effect "we do not search with regards to surrounding properties. You must make your own enquiries with council". You don't specifically remember saying this to the purchaser and you have not confirmed the advice in writing or made a file note. Of course the purchaser denies that you gave that advice.

This scenario was considered by the Supreme Court in 2007. The court accepted the evidence of the solicitor. However in this case the solicitor had previously acted for the purchaser on other purchases and had given similar advice in writing on those matters.

If the solicitor could not have established his usual practice with objective evidence the defence would probably have failed.

So, what are the lessons here?

- It is better to have a usual practice than not
- Usual practice evidence will not be enough in most cases
- If the transaction is not routine usual practice evidence will be less persuasive
- Confirm oral advice in writing so the confirmation becomes and is evidence of your usual practice
- If file notes and confirmation letters are part of your usual practice you are less likely to be exposed to a claim at all

A link to the case can be found below:

Luxford & Anor v Sidhu & Ors [2007] NSWSC 1356

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