

ETHICS: Client Identification and other Ethical Dilemmas in Property Law

A. BACKGROUND

1. Lawyers always need to know who their client is to be able to provide sound advice, to take legal action in the correct name and to know to whom they owe professional duties. This is so in every area of law, but it is a matter of particular importance in lawyers who are involved in property transactions. Property lawyers must ensure that the person claiming authority to deal with land is legally permitted to do so. This includes confirming a person's capacity to act as agent for a company or as an attorney. The professional and ethical rules that govern the role and obligations of solicitors operating in this space have recently been reformed and standardised.

B. Who is the client? Who are you taking instructions from and why does it matter?

2. The need to identify who a client is raises two interconnected issues. The first affects all lawyers. The second has a particular impact on property lawyers.
3. First, is the issue of client identification. That is, who amongst all the people that a solicitor may interact or deal within the course of a matter is the person to whom they owe duties.
4. Second, is the issue of identification verification. That is, whether the person a solicitor understands to be their client is in fact that person.

General obligations under the Rules

5. The Legal Profession Uniform Law Australian Solicitors Conduct Rules ('**Conduct rules**') impose a number of obligations on solicitors that emphasise the importance of proper client identification.

6. The starting point is the obligation of a solicitor to act on their client's instructions.

8 Client instructions

8.1 A solicitor must follow a client's lawful, proper and competent instruction

7. The significance of this rule is clear. Where a solicitor is lawfully, properly and competently instructed they are obliged to follow those instructions. Accordingly, the proper identification of the client is essential to determining whose instructions are binding on that solicitor.

8. While client identification may appear to be a simple task, it can become complicated in the context of property transactions that involve multiple family members or companies. It may be the case that a solicitor is acting for multiple family members with an interest in a property, or for individual directors of a company along with the company itself. Determining who is the proper client will determine where a solicitor's obligations lie.

9. The Conduct rules also address, in a number of ways, how solicitors are to approach the interests of their respective clients. A proper identification of the client provides the foundation for that assessment.

4 Other fundamental ethical duties

4.1 A solicitor must also:

4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client,

...

10 Conflicts concerning former clients

10.1 A solicitor and law practice must avoid conflicts between the duties owed to current and former clients, except as permitted by Rule 10.2.

10.2 A solicitor or law practice who or which is in possession of information which is confidential to a former client where that information might reasonably be concluded to be material to the matter of another client

and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:

10.2.1 the former client has given informed written consent to the solicitor or law practice so acting, or

10.2.2 an effective information barrier has been established.

11 Conflict of duties concerning current clients

11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule.

11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3.

11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor or law practice may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:

11.3.1 is aware that the solicitor or law practice is also acting for another client, and

11.3.2 has given informed consent to the solicitor or law practice so acting.

11.4 In addition to the requirements of Rule 11.3, where a solicitor or law practice is in possession of information which is confidential to a client (the first client) which might reasonably be concluded to be material to

another client's current matter and detrimental to the interests of the first client if disclosed, there is a conflict of duties and the solicitor and the solicitor's law practice must not act for the other client, except as follows:

11.4.1 a solicitor may act where there is a conflict of duties arising from the possession of confidential information, where each client has given informed consent to the solicitor acting for another client, and

11.4.2 a law practice (and the solicitors concerned) may act where there is a conflict of duties arising from the possession of confidential information where an effective information barrier has been established.

11.5 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice may only continue to act for one of the clients (or a group of clients between whom there is no conflict) provided the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

10. These rules set out the minimum standard of conduct required for professional practice. As should be known to all practitioners, a breach of the rules can lead to disciplinary proceedings being commenced. It is important that solicitors be mindful at all times of their obligations under these rules so as to properly serve the interests of their clients.

Obligations in property transactions

11. The importance of client identification for property lawyers goes beyond the general obligations that arise under the Conduct Rules. Verification of identification is essential in land and property dealings as a means of reducing

identity theft and land title fraud. While formal and thorough verification of identity has always formed part of good practice, what constitutes an acceptable standard for diligent identification has been formalised through the national adoption of a Verification of Identification Standard (**VOIS**).

12. The development of the VOIS arose in connection with the development of a national electronic conveyancing network. The Electronic Conveyancing National Law (**ECNL**) governs the provisioning and operation of electronic conveyancing within Australia. The ECNL was first implemented in NSW as an Appendix to the *Electronic Conveyancing (Adoption of National Law) Act 2012*. Section 23 of the ECNL empowers a registrar in each state jurisdiction to promulgate participation rules for their state or territory based on the *Model Participation Rules* developed by the Australian Registrars National Electronic Conveyancing Council (**ARNECC**). The *NSW Participation Rules for Electronic Surveillance v. 5* was introduced in February 2019. The VOIS is set out in Schedule 8 of the Model Participation Rules. The VOIS is no doubt familiar to property lawyers but may be briefly stated as requiring:

- a) a face-to-face interview between the Identity Verifier and the Person Being Identified;
- b) a review of certain documentary evidence as to identity at that interview;
and
- c) in the absence of documentary evidence, an Identifier Declaration can be used to verify identity.

13. Any solicitor who is advising a proposed party to a property transaction has an obligation to verify the identity of that person. Rule 11 of the *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015* relevantly provides:

11 Loan and security documents

11.1 This rule applies where:

11.1.1 *a solicitor is engaged to give advice to a proposed signatory that will be:*

11.1.1.1 *a borrower, a grantor of a security interest, or a security provider referred to as a borrower (**a borrower**) in loan or security documents, or*

11.1.1.2 *a third-party mortgagor, guarantor, surety mortgagor or indemnifier (**a guarantor**) providing security for the borrower, and*

11.1.2 *the solicitor has been asked to provide evidence of the advice.*

11.2 *The solicitor providing the advice must verify the identity of the proposed signatory using the Verification of Identity Standard contained in Schedule 8 to the Model Participation Rules determined by the Australian Registrars' National Electronic Conveyancing Council as adopted and made by each jurisdiction pursuant to section 23 of the Electronic Conveyancing National Law.*

...

14. As noted above, the VOIS requires that identity verification occur in the context of a face-to-face interview between the identity verifier and the person being identified¹. If the Person Being Identified produces identification documents containing photographs to the Identify Verifier as part of the identification process, the identity verifier must be satisfied that the person being identified is of

¹ "conveyancing transaction" is defined in the ECNL to mean a transaction that involves one or more parties and the purpose of which is:

- (a) to create, transfer, dispose of, mortgage, charge, lease or deal with in any other way an estate or interest in land, or
- (b) to get something registered, noted or recorded in the [titles register](#), or
- (c) to get the registration, note or record of something in the [titles register](#) changed, withdrawn or removed.

a reasonable likeness to the person depicted in the photograph. It should be noted that this significantly changes the position that previously existed under the *NSW Professional Conduct and Practice Rules 2013* which did not specify the need to verify a mortgagor's identity against both a primary non-photographic identification document and a secondary identification document. The VOIS requires a high standard of identification documents.

15. Since 2016, the VOIS has applied to conveyancing transaction in NSW after the standard was incorporated into the *Conveyancing Rules*. The legislative basis for the *Conveyancing Rules* is located in Section 12E of the *Real Property Act 1900* (NSW):

12E Conveyancing rules

- (1) *Making of conveyancing rules* The Registrar-General may from time to time determine, in writing, rules for or with respect to the preparation and lodgment of documents to give effect to conveyancing transactions (the conveyancing rules), including rules for or with respect to the following:
- (a) *the verification of identity and authority, including:*
 - (i) *the standards to which identity and authority are to be verified, and*
 - (ii) *the classes of persons in respect of whom identity and authority are to be verified, and*
 - (iii) *the classes of documents in relation to which verification of identity and authority requirements apply, and*
 - (iv) *the classes of persons who can undertake verification of identity and authority, and*
 - (v) *any supporting evidence and retention requirements,*

16. The manner of compliance is prescribed by the rules themselves. Relevantly:

- (a) nothing in the Conveyancing Rules detracts from any professional responsibility or due diligence requirement applying to representatives²;
- (b) a representative must take reasonable steps to verify the identity of each client or each of their Client Agents³; and
- (c) a representative or mortgagee must take reasonable steps to verify the identity and authority of any Client or Client Agent to whom certificates of title are provided⁴.

17. A solicitor will have complied with the *Conveyancing Rules* where they apply the VOIS. However, if the VOIS is not applied, a solicitor may still comply with the *Conveyancing Rules* by verifying the identity of the person in some *other* way that constituted '*reasonable steps*'.

18. The application of the VOIS has had a significant impact on many areas of practice for property lawyers. Observance of the standard is of critical importance, and the development of appropriate processes is necessary to mitigate the risk of significant consequences.

19. Compliance with the *Conveyancing Rules* is required before presenting a mortgage for lodgement. Section 56C of the *Real Property Act* provides:

56C Confirmation of identity of mortgagor

- (1) ***Mortgagee must confirm identity of mortgagor*** *Before presenting a mortgage for lodgment under this Act, the mortgagee must take reasonable steps to ensure that the person who executed the mortgage, or on whose behalf the mortgage was executed, as mortgagor is the same person who is, or is to become, the*

² *Conveyancing Rules*, r 4.1.1

³ *Ibid*, r 4.1.2

⁴ *Ibid*, r 4.1.3. Note, this rule does not apply to a representative providing a certificate of title to another representative for the purposes of settlement

registered proprietor of the land that is security for the payment of the debt to which the mortgage relates.

(2) **Without limiting the generality of subsection (1), the mortgagee is to be considered as having taken reasonable steps to ensure the identity of the mortgagor under subsection (1) if the mortgagee has taken the steps prescribed by the conveyancing rules.**

(3) **Record-keeping requirements** A mortgagee must keep for a period of 7 years from the date of registration of the mortgage under this Act (or for such other period as may be prescribed by the regulations):

(a) a written **record** of the steps taken by the mortgagee to comply with subsection (1), or

(b) a copy of any document obtained by the mortgagee to comply with subsection (1).

(4) **Mortgagee to answer questions and produce documents** The Registrar-General, in determining whether or not this section has been complied with, may at any time require the mortgagee:

(a) to answer questions in relation to the steps taken by the mortgagee to comply with subsection (1), and

(b) to produce for inspection any records kept under subsection (3).

(5) If a person fails to comply with a requirement made under subsection (4), the Registrar-General may:

(a) in relation to a registered mortgage—make a recording in the Register, with respect to the relevant land, to that effect, and

- (b) *in relation to a mortgage that has not been registered—refuse to register, or reject, the mortgage in accordance with section 39 (1A) or refuse to make any recording or entry in the Register or take any other action in respect of the mortgage.*
- (6) *The Registrar-General may cancel, in such manner as the Registrar-General considers appropriate, any recording in the Register with respect to a mortgage if the Registrar-General is of the opinion:*
- (a) *that the execution of the mortgage involved fraud against the registered proprietor of the mortgaged land, and*
- (b) *that the mortgagee:*
- (i) *has failed to comply with subsection (1), or*
- (ii) *had actual or constructive notice that the mortgagor was not the same person as the person who was, or was about to become, the registered proprietor of the land that is security for the payment of the debt to which the mortgage relates.*
- (7) *Before cancelling a recording of a mortgage in the Register under subsection (6), the Registrar-General must give notice of the proposed cancellation to the mortgagee and may also give notice to any other person that the Registrar-General considers should be notified of the cancellation. Section 12A (2) and (3) apply to and with respect to a notice given under this section.*
- (8) **Application to transferee of a mortgage** *This section applies to the transferee of a mortgage in the same way that it applies to a mortgagee (that is, requiring the transferee of a mortgage to take reasonable steps to ensure that the person who executed the mortgage as mortgagor is the same person who is, or is about to*

become, the registered proprietor of the land that is security for the payment of the debt to which the mortgage relates). Accordingly, a reference in this section to:

(a) the presentation of a mortgage includes a reference to the presentation of a transfer of mortgage, and

(b) the mortgagee includes a reference to the transferee of the mortgage, and

(c) the date of the registration of the mortgage includes a reference to the date of registration of the transfer of mortgage.

20. It is plain that the consequences of a failure to comply with s 56C can have significant consequences for a client's interest in a property and professional consequences for the solicitor. In *Michaelangelo Alfredo Mascarello & Anor v Registrar-General of New South Wales* [2018] NSWSC 284 ('**Mascarello**'), the Supreme Court of NSW considered a solicitor's duty of care to their clients in the context of a mortgage fraud. The plaintiffs were the victim of a fraud perpetrated against them by their son, with the assistance of a mortgage broker. The fraud involved the plaintiff's son:

- a) registering a company with both his parents unknowingly listed as directors;
- b) procuring the genuine identity documents of his parents;
- c) enlisting the services of a mortgage broker to procure loans for the company;
- d) enlisting the services of two imposters to masquerade as his parents and attending the offices of a solicitor;
- e) retaining said solicitor to witness fraudulent signatures of, and act for, the imposters via the company as they pretended to be the plaintiffs; and

f) entering into loan agreements, and using the fraudulent signatures witnessed by the solicitor to put forward property owned by his parents as security.

21. The plaintiffs became aware of the fraud following the final loan falling into default. They sold all of their properties to pay off the debt and made a claim for compensation from the NSW Torrens Assurance Fund⁵. After they commenced proceedings, the Registrar-General issued a cross-claim against the solicitor.

22. The retainer of the solicitor involved was limited to explaining the loan documentation and witnessing the signatures of the plaintiffs. The scope of the retainer did not extend to advising the lenders or performing some form of credit function for the lenders by scrutinising the borrowers or the information provided in support of the loan applications. The solicitor was engaged to merely assist the borrowers in properly executing loan documents for the provision to the lender who were separately and independently represented.

23. His Honour Justice Sackar found the applicable standard of care required the solicitor to take reasonable steps in identifying the plaintiffs and witnessing their signatures on various loan and security documents. Significantly, the various statutory and regulatory pronouncements provided a backdrop as to what is or what is not required by way of particular steps to be taken by a solicitor in particular circumstances⁶.

24. His Honour found that the solicitor had not breached the duty of care owed to the plaintiffs, and that she had taken reasonable steps to identify the plaintiffs with reference to original photographic identification documents, although she was ultimately duped. Importantly, his Honour found that the solicitor was not obliged to exceed the requirements imposed on her by the Solicitors Rules and the *Real Property Regulations* or to uncover a 'well-orchestrated fraud'.

⁵ See s 113 *Real Property Act 1900* (NSW)

⁶ *Mascarello* at [292]

25. Although the decision in *Mascarello* turned on the particular circumstances of that case, it does highlight the significant consequences that can flow as a result of a failure in VOI procedures. A primary plank in the Registrar-General's case against the solicitor related to alleged deficiencies in her VOI processes and record keeping, as compared with a competent standard of practice.

C. Developing appropriate policies on VOI- best practice guidance

26. As was the case in *Mascarello*, solicitors acting in property transactions are often required to verify the identity of new clients that are not known to them. Best practice requires solicitors to apply the VOIS to ensure that they have discharged their various obligations.

27. It must be acknowledged that the availability and appropriateness of face-to-face meetings, as required by the VOIS, has been impacted by the COVID-19 pandemic. Although the VOIS is regarded as best practice, it is not considered mandatory and flexibility exists within the system. Specifically, there is provision for the possibility that the VOIS may not be complied with, a person's identity can still be verified in some other way that constitutes the taking of reasonable steps.

Conference

28. As noted, the primary requirement of the VOIS is that identification verification occurs in the context of an in-person conference between the identifier, and the person whose identity is being verified. Where it is not possible to comply with the VOIS use of video technology, such as Skype or FaceTime, may be useful in the particular circumstances. The ARNECC Model Practice Guidance Note 2 warned that interviews over such technologies carry a risk of manipulation and as such, do not comply with the VOIS. They do not constitute a face-to-face in person interview nor does it allow identification of documents in an interview as required by VOIS.

29. However, it may still be reasonable to use video technology in certain circumstances. It falls to the identifier to determine (and later justify) that, in the

circumstances of that particular verification of identity, use of video technology and any other measures used, constituted the taking of reasonable steps.

30. A solicitor who is in the process of verifying a client's identity ought to request and inspect identification documents. The VOIS provides for categorisation of such documents. The categories are set out in a table which has been included at Appendix 1 of this paper. The VOIS establishes a requirement that the person being identified produces original documents in one of the categories in the table, starting with Category 1. The provision of original documents, and the verification steps that follow are best facilitated through an in-person conference.

31. The following steps are required for an identity verifier's obligations under the VOIS to be complied with:

- a) the solicitor must be satisfied that a prior category cannot be met before moving on to a subsequent category;
- b) the solicitor must sight original documents from the relevant category;
- c) any identification documents must be current⁷; and
- d) the solicitor must retain a copy of all documents being produced.

Photographs

32. In most circumstances, the solicitor will receive an identification document with a photograph included on it. As is highlighted by *Mascarello*, it is important to scrutinise that document, and to compare the photograph closely with the appearance of the person providing the document. The VOIS requires that the identity verifier is satisfied that the person being identified is '*a reasonable likeness*' to the person in the photograph. It is suggested that an identity verifier will observe, for example, any similarities or differences in the shape of his or her

⁷ There is an exception for Australian Passports which have not been cancelled and was current within the preceding two years of the VOI process taking place.

mouth, nose or eyes, and the position of their cheekbones. In addition to what is required by the VOIS, it is arguably best practice for the solicitor verifying the identity to take a photograph of the person being identified at the time that the verification takes place. This will provide a contemporaneous record of the appearance of that person, when the process was undertaken.

Documents

33. Where a verifier knows, or should reasonably know, that a document is not genuine, the verifier must take additional steps to confirm the person's identity. Matters that might give rise to a suspicion are varied, and include:

- a) Discrepancies between details (for example, the listed address details) between identification documents and other documents (for example, loan documents) should prompt further enquiry to resolve any doubt that might arise in the mind of the solicitor about the reason for the difference. Cross-checking details between documents is critical.
- b) Discrepancies between a signature that appears on an identification document against a signature that has been witnessed may also lead to suspicion. Consider searching the register to examine signatures on a previous transfer or mortgage for comparison.
- c) The nature of the identification document itself, as compared with a solicitor's knowledge and familiarity of similar documents. For example, are any emblems or holographic watermarks consistent with other documents of the same nature.

34. Concerns regarding the genuineness of a document can arise in myriad ways. Best practice dictates that sufficient time and attention should be given to the documents provided, with a focus on seeking out potential forgery or fraud.

File notes

35. File notes are essential in all interactions with clients. In the context of VOI, the file note should record all relevant details of the client, in particular their full name, date of birth and address. If there is any discrepancy between the information that appears across the various identification documents, the steps that were taken to address that discrepancy, and the results of any enquiries, should be outlined in detail in the file note.

36. Any identification that was provided in the course of the VOI process should be photocopied and the copy attached or stored with the file note for reference.

Identity Agent

37. Solicitors are permitted to use an agent for identify verification. Identify Agents are persons or entities who:

- a) hold the required minim level of insurance set out in the Model Participation Rules and Model Operating Requirements;
- b) there is a basis to believe they are reputable and competent; and
- c) authorised to conduct verification in accordance with the relevant standards.

38. The NSW Participation Rules provide that where an Identity Agent is used, the Solicitor must direct the Identity Agent to use the VOIS. The Identity Agent must provide to the Solicitor copies of the documents produced to the Identity Agent and/or Identity Declarant and an Identity Agent Certification.

D. Does the client have capacity? Ethical considerations when determining whether your client has capacity and appropriate alternatives?

39. Circumstances may arise that cause a legal practitioner to question the capacity of their client to provide instructions, such as when a client appears to a solicitor to suffer from a cognitive impairment or some other disorder of the mind. Solicitors play an important role in assisting these clients. Clients whose cognitive

capacity is impaired may be vulnerable to exploitation by others and may not be able to protect their own legal interest.

40. Rule 8 of the Conduct Rules is set out at 6 above. The solicitor should assess whether a client has the requisite mental capacity before either taking instructions or assisting them to make a legal decision that will affect their interests. Where doubt arises in the mind of a legal practitioner as to the capacity of a client to provide them with competent instructions further enquiry is required.
41. There is no bright line test for capacity amongst clients, and questions of capacity are ultimately relative. The general law does not prescribe a fixed standard of 'capacity' required for the transaction of business. The level of capacity required of a person is relative to the particular business to be transacted by him or her, and the purpose of the law served by an inquiry into the person's capacity⁸. This means that where a client is not capable of providing instructions in respect of one legal decision, they may still remain capable of providing instructions in respect of another.
42. If a conclusion is reached that a client does not have capacity to instruct, a solicitor may apply to the Supreme Court or NCAT for the appointment of a guardian or a financial manager. These applications should only be brought by solicitors in the absence of any other reasonable alternative⁹.
43. Where a solicitor makes an application on behalf of a client without capacity, issues of confidentiality can arise. Rule 9 of the Conduct Rules provides:

9 Confidentiality

9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not:

⁸ *Gibbons v Wright* (1954) 91 CLR 423 at 434 - 438

⁹ *R v P* [2001] NSWCA 473 at [63]

9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor's law practice, or

9.1.2 a barrister or an employee of, or person otherwise engaged by, the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client,

EXCEPT as permitted in Rule 9.2.

9.2 A solicitor may disclose information which is confidential to a client if:

9.2.1 the client expressly or impliedly authorises disclosure,

9.2.2 the solicitor is permitted or is compelled by law to disclose,

9.2.3 the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations,

9.2.4 the solicitor discloses the information for the sole purpose of avoiding the probable commission of a serious criminal offence,

9.2.5 the solicitor discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person, or

9.2.6 the information is disclosed to the insurer of the solicitor, law practice or associated entity.

44. It is naturally the case that where a client lacks capacity, there can be no express or implied authority to disclose confidential information. Accordingly, one of the other exceptions to the general rule in 9.1 must apply.

45. The bringing of an action against a client on the issue of competency is complex because it (at least perceptually) involves a direct conflict between the duty to do

what is best for the client and the duty to act in accordance with the client's instructions. However, solicitors must remember they are officers of the court. The final decision on mental capacity to engage in a transaction or litigation rests not with lawyers, medical practitioners, or the client but the Court. By bringing the issue of competency for determination by the Court, the solicitor is in fact assisting the court as an officer of the court to determine its own function¹⁰.

E. Proof of identify when an entity is the client

46. Where a client is an entity such as an incorporation, the process involved in verifying its identity is subject to additional considerations. Primarily, the matters to which a solicitor must turn their mind is whether the person or persons providing instructions has or have appropriate authority to provide instructions in relation to a property transaction on behalf of that entity.

47. Identification of a client that is not a natural person requires:

- a) confirmation of the existence and identity of the entity (such as via a search of the records of ASIC or other relevant regulatory body);
- b) taking reasonable steps to establish who is authorised to sign for the body corporate or witness the affixing of any seal; and
- c) verifying the identity of the individuals signing or witnessing the affixing the seal on behalf of the body corporate in accordance with the Verification Standard.

48. It is necessary to obtain the name of the client as registered with ASIC or other regulatory body, the address of the registered office and principal place of business, the ACN, registration status and name of each office holder. In addition, it is necessary for the solicitor to be satisfied that instructions are obtained from a person properly authorised to provide instructions on behalf of that entity.

¹⁰ *Goddard Elliott v Fritsch* [2012] VR 87.

F. Reasonable steps to establish authority to instruct

49. In every conveyancing transaction, a solicitor must verify their client's authority to deal with the property that is the subject of the transaction. This verification mitigates the risk of fraudulent transactions and provides the counterparty with confidence that they are transacting with a person who has the right to do so.

50. A solicitor must take reasonable steps to verify the right to deal with the property the subject of a transaction. '*Reasonable steps*' is a commonly used legal concept. What constitutes reasonable steps is not defined and may be influenced by various factors. Ultimately, whether reasonable steps were taken will be a question of fact depending on the circumstances of the individual case. Due to the nature of the enquiry, judicial consideration of the meaning of the phrase is of limited assistance. In *Big Country Developments Pty Ltd v Griffiths (No 3)* [2015] NSWSC 1182, Kunc J noted the importance of context when considering the meaning of '*reasonable steps*' at [153]:

'Because of the essential importance of context, the consideration in other cases of the phrase '*reasonable steps*' will not necessarily be decisive but can nevertheless be instructive. The phrase '*takes all reasonable steps to purchase a ticket*' as it appeared in certain Victorian legislation was considered by Nettle J sitting in the Supreme Court of Victoria in *Mounsey v Lafayette* [2002] VSC 0342 ; (2002) 37 MVR 256 (citations omitted):

28. In *Rolfe v Willis*, the High Court was concerned with a question of whether a landlord had taken '*reasonable steps to prevent drunkenness*' on licensed premises. It was held that:

'Reasonable steps to prevent drunkenness' means such steps as ought reasonably to be taken by way of precaution against the occurrence of drunkenness on the premises under any circumstances that may reasonably be anticipated and to prevent its continuance when its existence is discovered.

29. In *Young v Paddle Brothers Pty Ltd*, Herring CJ was concerned with the question of whether a motorist had exercised '*reasonable diligence*' in attempting to identify the driver of a vehicle, and his Honour adopted the following test, which had been laid down in *The Europe* in discerning whether the owners of a damaged vessel had used reasonable diligence to discover her whereabouts:

'... the meaning of such expression (i.e., "reasonable diligence") is not the doing of everything possible, but the doing of that which, under ordinary circumstances and with regard to expense and difficulty, could be reasonably required'

30. Similar aphorisms have been employed to explain the meaning of 'reasonable steps' and 'all reasonable steps' in other statutory contexts: see, for example, *Australian Meat Industries Employees Union v G & K O'Connor Pty Ltd*; *Deputy Cmr of Taxation v Pejkoivic*. The essential idea is that reasonable steps are what a reasonable man or woman would regard as being reasonable steps in the circumstances which apply'

51. At a minimum, as set out in the MPR Guidance Note 4, when establishing a client's authority to deal with property, '*reasonable steps*' will require the verifier to sight supporting evidence that includes the name of the person whose right to deal is being verified and the property or transaction details. The supporting evidence should establish a connection between registered interest holder or transacting party to the land. More extensive checks and enquiries should be made where doubt arises, or should reasonably have arisen, in relation to a transaction and a person's right to deal.

52. There are a number of standard documents the property lawyers will have regard to when verifying a individual has a right to deal. These include requesting the party to produce rates notices, utility bills, land tax assessments etc. However, there are certain transactions where a property solicitor will be required to take

further enquiries to satisfy themselves that the client has a right to deal in that property. These include (but are not limited to):

- a) Is the property the subject of a trust? If so, this will require interrogation of trust documents to determine who are the trustees and whether the transaction is permitted at all.
- b) Is one of the parties to the transaction insolvent? If so, how does the relevant legislation impact on the authority for the client to deal with that property?
- c) Is the client acting as Executor of an estate under a will? If so, is the transaction contemplated by the relevant succession documents?
- d) Is the transacting party subject to Guardianship legislation? If so, is the transaction permitted under the relevant legislation?

53. Each of these examples will require, as a matter of course, further enquiry to be made in relation to the way in which the right to deal arises. This will usually require regard to be had to a relevant instrument that determines the right and/or obligations of the party in respect of property dealings. Solicitors should carefully document steps taken to ascertain a client's authority to deal in the subject property.

G. When should you cease acting? Ethical dilemmas involving client identity issues?

54. Circumstances that may compel a legal practitioner to cease acting for a client will generally arise where the conduct of their client creates a difficulty for them in complying with their own professional and ethical obligations.

55. In the context of VOI, there are a number of circumstances that will require further enquiry to satisfy the obligations imposed on a solicitor. If those enquiries do not satisfy those concerns, consideration will need to be made as to whether the solicitor can continue to act on the transaction.

56. The VOIS provides that the Identity Verifier must undertake further steps to verify the identify of the Persons Being Identified and/or Identity Declarant where:

- a) The Identity Verifier knows or ought reasonably to know that:
 - i. any identify Document produced by the Person Being Identified and/or the Identity Declarant is not genuine; or
 - ii. any photograph of on an identity Document proceeded by the Person Being Identified and/or the Identity Declarant is not a reasonable likeness of the Person Being Identified or the Identity Declarant; or
 - iii. the Person Being Identified and/or the Identity Declarant does not appear to be the Person to which the identity Document(s)s relate; or
- b) it would otherwise be reasonable to do so.

57. Where further checks are necessary and a client refuses to or is unable to comply with requests for further information, or for the provision of further documentation then the solicitor is not able to comply with their obligations. In those circumstances it would be expected the solicitor will cease acting. To continue to act invites a breach of the solicitors professional and ethical obligations.

4 March 2021

B. Bradley
Greenway Chambers

J. Simpson
Greenway Chambers

Appendix 1

Category	Minimum Document Requirements
	For Persons who are Australian citizens or residents
1	Australian Passport or foreign passport or Australian Evidence of Immigration Status ImmiCard or Australian Migration Status ImmiCard <u>plus</u> Australian drivers licence or Photo Card <u>plus</u> change of name or marriage certificate if necessary
2	Australian Passport or foreign passport or Australian Evidence of Immigration Status ImmiCard or Australian Migration Status ImmiCard <u>plus</u> full birth certificate or citizenship certificate or descent certificate <u>plus</u> Medicare or Centrelink or Department of Veterans' Affairs card <u>plus</u> change of name or marriage certificate if necessary
3	Australian drivers licence or Photo Card <u>plus</u> full birth certificate or citizenship certificate or descent certificate <u>plus</u> Medicare or Centrelink or Department of Veterans' Affairs card <u>plus</u> change of name or marriage certificate if necessary
4	(a) Australian Passport or foreign passport or Australian Evidence of Immigration Status ImmiCard or Australian Migration Status ImmiCard <u>plus</u> another form of government issued photographic identity Document <u>plus</u> change of name or marriage certificate if necessary (b) Australian Passport or foreign passport or Australian Evidence of Immigration Status ImmiCard or Australian Migration Status ImmiCard <u>plus</u> full birth certificate <u>plus</u> another form of government issued identity Document <u>plus</u> change of name or marriage certificate if necessary
5	(a) Identifier Declaration <u>plus</u> full birth certificate or citizenship certificate or descent certificate <u>plus</u> Medicare or Centrelink or Department of Veterans' Affairs card <u>plus</u> change of name or marriage certificate if necessary. (b) Identifier Declaration by a Person specified in Verification of Identity Standard paragraph 4.4(e) <u>plus</u> Medicare or Centrelink or Department of Veterans' Affairs card <u>plus</u> change of name or marriage certificate if necessary. <i>Note: Refer to Verification of Identity Standard paragraph 4.</i>
	For Persons who are not Australian citizens or residents
6	(a) Foreign passport <u>plus</u> another form of government issued photographic identity Document <u>plus</u> change of name or marriage certificate if necessary (b) Foreign passport <u>plus</u> full birth certificate <u>plus</u> another form of government issued identity Document <u>plus</u> change of name or marriage certificate if necessary.