The penumbral duty of care — is a principled approach possible?

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In this article, the author explores the evolution and development of the law in relation to the penumbral duty of care of solicitors and notes the increased willingness of the New South Wales Court of Appeal in recent times to find the existence of a penumbral duty of care in certain circumstances. The author notes the lack of a cohesive jurisprudential basis for the finding of the existence of such a duty and suggests that the salient features test expounded in ***Caltex Refineries (Qld) Pty Ltd v Stavar (2009) 75 NSWLR 649*** *propounded by Allsop P might provide such a basis.*

> [t]hat uncertainty that appears necessarily to affect this area of the law if entitlement to damages is to depend upon [a] case-by-case application of a general policy, itself inflexible and ill-defined and dependent upon a survey of a quite variable group of considerations, many of which will be susceptible of the production of differing, subjective judicial reactions.[1]

It is trite law that in Australia, a solicitor engaged by a client is under concurrent obligations in both contract and tort to exercise care, diligence and skill in performing the scope of the retainer.[2] In *Hawkins v Clayton*,[3] the High Court held that in certain circumstances, the tortious duty owed to a client might extend beyond the parameters of the retainer and require a solicitor to take positive steps to avoid a client sustaining any real and foreseeable economic loss.[4] Such an obligation has been termed the solicitor's 'penumbral duty of care'.[5] This article considers the circumstances in which a court will extend the tortious duty of care of a solicitor beyond the four corners of the solicitor-client retainer to impose upon the solicitor a duty to avoid any real and foreseeable financial loss, requiring in some circumstances that the solicitor provide financial advice, and whether a principled approach to this issue can be distilled from the cases.

The principle underlying the circumstances in which a court will imply a penumbral duty of care has not been uniformly applied throughout Australia and there has been debate, primarily in the NSW Court of Appeal, as to the

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1 *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'* (1976) 136 CLR 529 at 567 per Stephen J; 11 ALR 227; 51 ALJR 270; BC7600087.

2 *Astley v Austrust Ltd* (1999) 197 CLR 1 at 23; 161 ALR 155; [1999] HCA 6; BC9900546 at [48].

3 (1988) 164 CLR 539; 78 ALR 69; 62 ALJR 240; BC8802597.

4 (1988) 164 CLR 539 at 579; 78 ALR 69; 62 ALJR 240; BC880259. In *Hawkins v Clayton*, solicitors were held to owe a duty of care to an executor appointed under a will prepared by the solicitors, it was the combination of the unlikelihood that the executor would realise his appointment as an executor due to the personal dispute with the testatrix, the ease of being able to locate the executor, and the lack of a valid excuse for the delay on the part of the solicitors that implied the penumbral duty of care obliging the solicitors to take positive action beyond the terms of the retainer.

5 *Kowalczuk v Accom Finance* (2008) 77 NSWLR 205 at 263; 252 ALR 55; [2008] NSWCA 343; BC200810918 at [267].

currency of the principle in *Hawkins*. The result is that the case law has not developed any single approach that is able to elucidate with sufficient certainty in what circumstances such a penumbral duty may arise and what the content of such a duty should be.

While the Victorian and Tasmanian courts have considered the issue of whether a penumbral duty may exist and the circumstances in which it may exist, most developments have been in New South Wales. Decisions in the NSW Supreme Court and Court of Appeal have, however, come to differing conclusions concerning whether a penumbral duty of care exists in certain circumstances. This is undoubtedly a function in part of the fact that the specific content of the penumbral duty of care is theoretically unlimited and can vary depending upon the factual scenario in which it is said to arise.[6] It is therefore unsurprising that the circumstances in which the courts will impose a penumbral duty on a solicitor outside the ambit of the express and implied terms of the retainer have been the subject of uncertainty.

In cases in which the penumbral duty of care is imposed, the court is being asked to find a duty of care beyond the four corners of the contract and beyond the scope of what the solicitor has actually been retained to do. The issue is therefore not whether a concurrent duty of care should exist in contract and in tort. Instead, the issue is whether the lawyer, who has not been retained to provide advice on the financial implications of a transaction, should be under a tortious obligation to provide that service and the circumstances in which such an obligation should be placed upon the lawyer.

The hypothesis of this article is that the courts should adopt a multifactorial approach which incorporates as its central tenement the concept of vulnerability, to determine the existence and content of a penumbral duty of care. This approach draws its thesis from the decision of the High Court in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[7] which appears to have been developed and generalised by Allsop P in the NSW Court of Appeal in *Caltex Refineries (Qld) Pty Ltd v Stavar*.[8]

Hawkins v Clayton

In *Hawkins*, Deane J held that a solicitor might owe duties in tort to take positive steps, beyond the specifically agreed professional task outlined in the retainer, to avoid a real and foreseeable economic loss.[9] In *Hawkins* the defendants were a firm of solicitors in custody of a will, prepared by a senior partner, for their client. The solicitors failed to locate and inform the executor and principal beneficiary of his appointment under the will until 6 years after the death of the testatrix. The High Court held that the solicitors were under a duty to take the positive step of locating and informing the executor, despite no contractual relationship existing between the parties.

In implying a duty of care to the executor and principal beneficiary, Deane J held that:

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6 *Hawkins v Clayton* (1988) 164 CLR 539 at 579; 78 ALR 69; 62 ALJR 240; BC880259.
7 (2004) 216 CLR 515; 205 ALR 522; [2004] HCA 16; BC200401482.
8 (2009) 75 NSWLR 649; 259 ALR 616; [2009] NSWCA 258; BC200907980.
9 *Hawkins v Clayton* (1988) 164 CLR 539 at 579; 78 ALR 69; 62 ALJR 240; BC880259.

> The content of the duty of care in a particular case . . . may, in some special categories of case, extend to require the taking of positive steps to avoid physical damage or economic loss being sustained . . . the categories of case in which a relationship of proximity gives rise to a duty of care which may, according to the circumstances, so extend are, like those in which there is a duty of care to avoid pure economic loss, commonly those involving elements of an assumption of responsibility and reliance.[10]

It is significant that many solicitors take custody of the wills of their clients presumably with the intention of eventually receiving the retainer to act on behalf of the executor of the will. Some firms have as a result built up a large bank of wills and many have dedicated staff to undertake daily searches of the newspapers for death notices. In circumstances which can be said to amount to an assumption of responsibility, it is understandable that a court would have no difficulty in implying a penumbral duty of care to take positive steps to locate the executors or beneficiaries under the will that they have in their custody. The solicitor should have anticipated that the executors or beneficiaries of the will would be reliant upon the solicitor to locate them on the death of the client.

In *Hawkins*, a penumbral duty of care was satisfied by the assumption of responsibility by the firm of solicitors and reliance by the testatrix. In *Hill v Van Erp*,[11] the High Court found that a solicitor who had negligently caused the beneficiary of the will to witness the signature of the testatrix owed a duty of care to that beneficiary and was held to be liable for the loss suffered by the beneficiary resulting from a failure to take reasonable care in performing the client's instructions. There was, however, no common jurisdictional basis upon which this duty of care was based. The majority agreed that the third party disappointed beneficiary had to establish more than just foreseeability of loss, and that it was foreseeable that a beneficiary would suffer loss if a solicitor negligently performed his or her duty to the testator in drafting the will.[12] However, the agreement went no further. Dawson and Toohey JJ relied in part upon the special circumstances that may arise when solicitors are dealing with testamentary transactions. In that context, assumption of responsibility, control (proximity) and vulnerability of the third party beneficiary were relevant.[13] For Gaudron and Gummow JJ, in the absence of an assumption of responsibility, that which attracted the duty of care was that the solicitor had been in a position of control over the interests of the beneficiary.[14] In the context of reliance, it is interesting that Kiefel J in *Barclay v Penberthy*[15] held that vulnerability can arise where the defendant has knowledge of the plaintiff's reliance, although vulnerability can also arise otherwise than by reliance.

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10 Ibid, at CLR 579.

11 (1997) 188 CLR 159; (1997) 142 ALR 687; [1997] HCA 9; BC9700701.

12 Ibid, at CLR 170-1 per Brennan CJ, at 177-8, 186 per Dawson J, at 196-7 per Gaudron J, at 237 per Gummow J.

13 Ibid, at CLR 186 per Dawson J with whom Toohey J agreed at 188.

14 Ibid, at CLR 198-9 per Gaudron J, at 231-2 per Gummow J.

15 (2012) 246 CLR 258 at 321; 291 ALR 608; [2012] HCA 40; BC201207490 at [175].

The attitude of the NSW Court of Appeal

In *Citicorp Australia Ltd v O'Brien*,[16] a husband and wife had purchased a home and had engaged a solicitor to act on the contract for sale and on the mortgage of the property. The mortgage the couple entered into was repayable by monthly instalments, the amount of which increased at the end of each of the first 3 years. While the solicitor knew the weekly income of the clients, the solicitor did not inquire about the clients' full financial circumstances, nor did the clients proffer this information.[17] The solicitor did not recommend that the clients should seek independent financial advice, or any independent advice for that matter.[18] The issue was whether the solicitor should have considered the capacity of the clients to service the mortgage.

Elementary financial planning on the part of the solicitor on behalf of the clients would have revealed that the couple would not have been able to meet the monthly instalment payments and have enough money to live on. In relation to whether the circumstances imposed a penumbral duty on the solicitor to advise the clients about the risk of economic loss, Sheller JA held that:

> I am unable to accept that the terms of Mr Eliades' retainer or the general principles discussed in *Hawkins v Clayton* placed at the heart of the professional task Mr Eliades undertook for the O'Briens the need to consider their capacity to obtain finance and to obtain it on a realistic basis, which they could expect to meet.[19]

In finding against the existence of a penumbral duty of care, Sheller JA held:

> Stated bluntly, *such a duty would require solicitors, retained to act on a purchase or mortgage for their skill in the law, to inform every client for whom they so acted of their views about the financial prospects of the purchase or mortgage where they felt or ought reasonably to have felt that there was risk of loss*. One consequence of this would be to require solicitors to give opinions, which they were not qualified to give, with the obvious consequence that if they were wrong and the client had acted on the basis of those views, they would be liable in negligence. For good reason such a proposition is contrary to authority. *The solicitor's duty is found in the terms of the retainer and the ambit of any additional assumed responsibility relied upon*.[20]

In *Heydon v NRMA*,[21] the issue was the limits of the barrister's duty to advise. In providing advice to his client, the barrister had not drawn to the client's attention that the case upon which he had relied in giving his advice was the subject of a special leave application to the High Court. The outcome of that special leave application meant that the advice that had been given was no longer current. The NSW Court of Appeal approached the question of whether a penumbral duty of care might exist to advise upon matters beyond the limits of the retainer of the barrister with regard to the decision of *Astley v Austrust*

16 (1996) 40 NSWLR 398; [1996] ANZ ConvR 623; (1996) NSW ConvR 55-794; BC9605016.
17 (1996) 40 NSWLR 398 at 415; [1996] ANZ ConvR 623; (1996) NSW ConvR 55-794; BC9605016.
18 Ibid, at NSWLR 414.
19 Ibid, at NSWLR 418.
20 Ibid (emphasis added).
21 (2000) 51 NSWLR 1; 36 ACSR 462; [2000] NSWCA 374; BC200007998.

Ltd[22] and found by majority against the possibility of an existence of the penumbral duty of care.[23] In *Astley*, the High Court had adopted the reasoning of the House of Lords in *Henderson v Merrett Syndicates Ltd*[24] where Lord Goff of Chieveley held that the contract for services defined the relationship between the parties, that the contract contain an implied promise to exercise reasonable care and that concurrent liability would exist except in situations where the tortious duty is 'so inconsistent with the applicable contract that . . . the parties must be taken to have agreed that the tortious remedy is to be limited or excluded'.[25] A majority of the Court of Appeal held that by reason of *Astley v Austrust*, it was no longer good law in Australia to say that a solicitor or a barrister might owe its client a 'penumbral' duty to advise upon matters beyond the limits of his or her retainer. Prior to the decision of *Heydon v NRMA*, the courts had not been averse to finding the existence of a penumbral duty of care in appropriate circumstances.[26]

The reluctance of the Court of Appeal to imply a penumbral duty continued in *Kowalczuk v Accom Finance*,[27] *David v David*[28] and *Dominic v Riz*.[29]

In *Kowalczuk v Accom Finance*,[30] Campbell JA, after undertaking a lengthy review of the authorities on the penumbral duty of care, held that the solicitor's lack of awareness of the client's income (other than knowledge of the client's current annual income), intentions for the loan funds, occupation and asset and liability position, meant that no penumbral duty could exist. The only relationship between the solicitor and client was that the solicitor had been engaged for the isolated task of explaining the mortgage transaction documents on two separate occasions.[31]

In *David v David*,[32] a solicitor became aware part way through a retainer to provide clients with advice on a refinancing transaction that the firm of solicitors were also acting for the companies in which the funds were to be invested. The investment scheme promised exorbitant returns on a relatively modest investment. The solicitor had, however, made it clear to the clients that the firm could not advise the clients about the companies' business as this might provoke a conflict of interests and duty. The court held that in the circumstances, there was no conflict of interest and the solicitors had been entitled to continue to act for the clients and the companies receiving the investment funds as the firm had only been retained to give advice on the

22 (1999) 197 CLR 1; 161 ALR 155; [1999] HCA 6; BC9900546.
23 *Heydon v NRMA* (2000) 51 NSWLR 1 at 118; 36 ACSR 462; [2000] NSWCA 374; BC20000799 at [364].
24 [1995] 2 AC 145; [1994] 3 All ER 506; [1994] 3 WLR 761; [1994] 2 Lloyd's Rep 468.
25 *Astley v Austrust Ltd* (1999) 197 CLR 1 at 22; 161 ALR 155; [1999] HCA 6; BC9900546 at [46].
26 For example, in *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642 at 652; [1990] ANZ ConvR 230, a majority of the NSW Court of Appeal had held that an affirmative duty to advise might exist in relation to matters that were not directly within the ambit of the retainer from the client.
27 (2008) 77 NSWLR 205; 252 ALR 55; [2008] NSWCA 343; BC200810918.
28 [2009] NSWCA 8; BC200900572.
29 [2009] NSWCA 216; BC200906747.
30 (2008) 77 NSWLR 205; 252 ALR 55; [2008] NSWCA 343; BC200810918.
31 Ibid, at [294].
32 [2009] NSWCA 8; BC200900572.

financing transaction. Further, the solicitor had urged the clients in clear terms that they should both seek independent financial and legal advice about the investment prior to committing themselves to the investment.[33] Allsop P found that this advice was appropriate, reasonable and clear.[34]

Allsop P, however, helped open the possibility of a penumbral duty of care to avoid real or foreseeable economic loss being implied in certain circumstances:

> It is sufficient to say that the notion that a solicitor may owe a client a 'penumbral' duty that extends beyond scope of the retainer is doubtful. If, however, the solicitor during the execution of his or her retainer learns of facts which put him or her on notice that *the client's interests are endangered or at risk unless further steps beyond the limits of the retainer are carried out, depending on the circumstances, the solicitor may be obliged to speak in order to bring to the attention of the client the aspect of concern and to advise of the need for further advice either from the solicitor or from a third party*.[35]

In *Dominic v Riz*,[36] the Court of Appeal overturned the first instance decision that found a penumbral duty to avoid real or foreseeable economic loss did exist. The Court of Appeal was satisfied that the warnings and recommendations that the clients should seek both independent legal and financial advice on the underlying transactions, sufficiently discharged the solicitor's duty. The court was also satisfied that the clients had understood this advice and would act on it.[37] In this case the clients had borrowed money on mortgage to invest in a Karl Suleman scheme under which they were told they would recieve $12,000 a fortnight returns on an investment of $150,000. The clients had been fully aware of the risky nature of the investment and that the returns appeared too good to be true. They nevertheless chose to make the investment in the hope that the large returns would eventuate.

Both *David*[38] and *Dominic*[39] adopt a focus not on the nature or scope of any penumbral duty, but rather seek to construe the scope of the lawyer's retainer. A lawyer's knowledge of the transaction their client is entering into will impact upon how their retainer is discharged.[40] Should the lawyer become aware of facts 'which put him or her on notice that the client's interests are endangered or at risk unless further steps beyond the limits of the retainer are carried out',[41] a duty to take such steps may be incorporated into the retainer. Commenting on the passage in *David*,[42] Allsop P elaborated in *Dominic*: 'the performance of the retainer, and what is learnt during it, may affect how the retainer is properly discharged',[43] a duty to take such steps may be incorporated into the retainer. The court, up to this point, had hesitated to

33 Ibid, at [70].
34 Ibid, at [83].
35 Ibid, at [76] (emphasis added).
36 [2009] NSWCA 216; BC200906747.
37 Ibid, at [80], [85], [93], and [96].
38 *David v David* [2009] NSWCA 8; BC200900572.
39 *Dominic v Riz* [2009] NSWCA 216; BC200906747.
40 Ibid.
41 *David v David* [2009] NSWCA 8; BC200900572 at [76].
42 Ibid.
43 *Dominic v Riz* [2009] NSWCA 216; BC200906747 at [91].

explicitly endorse the existence of the penumbral duty.

In *AJH Lawyers Pty Ltd v Hamo*,[44] the Victorian Court of Appeal considered whether a solicitor had been negligent when he advised a client to defend a winding up application in circumstances where the client company was insolvent. There was also an additional issue of whether the solicitor had owed the client a duty to advise upon the commercial utility of defending the winding up application. The magistrate at first instance had held that the solicitor owed the client a duty to advise upon the commercial utility of defending the winding up application.[45] The magistrate had held that the solicitor had been under a duty to give the client 'holistic advice' and this duty had been breached. The Court of Appeal held that the doctrine of 'holistic legal advice'[46] did not exist and that there is no such obligation upon a solicitor to provide holistic advice.

On the facts of the case it was clear that the magistrate had made an error of law in making the findings of negligence for which there was no probative evidence. However, the Court of Appeal held that this was not an appropriate matter to be remitted to the magistrate for a re-trial as the plaintiff had chosen not to give evidence at the trial. The court quashed the decision of the magistrate and instead entered judgment for the solicitor, satisfied that in the circumstances of the case, the additional time bought by defending the application had given the company the benefit of additional time to negotiate terms of settlement which gave the company additional time to pay.[47] In the course of the judgment, the Court of Appeal affirmed the currency of the principle in *Hawkins v Clayton*[48] that depending upon the circumstances, a solicitor may come under a duty to do more than simply perform the task defined by his instructions. A duty to warn may arise where circumstances give rise to a real and foreseeable risk of economic loss by the client or, in particular circumstances, even a person who was not a client but who may be adversely affected.[49] Those circumstances would be generally satisfied where there had been assumption of responsibility by the solicitor and reliance by the client.[50] The court in *AJH Lawyers* was satisfied, however, that there was no evidence of either assumption of responsibility or reliance.

These cases demonstrate that pertinent to the issue of whether a penumbral duty of care exists is the extent of the solicitor's knowledge of the client's affairs, whether the transaction is clearly improvident and the precise scope of the solicitor's retainer. The relative weight of these factors is unclear. In the face of a potentially improvident financial transaction, it is suggested that a solicitor's duty of care should rise no higher than a recommendation to the client to obtain independent financial advice. This is consistent with the scope of the solicitor's retainer and expertise. It is suggested that in the absence of

44 (2010) 29 VR 384; [2010] VSCA 222; BC201006631.
45 Ibid at [23]. The magistrate had held that the advice was negligent because defending the application would have been pointless as it would have only given the company a 'short breathing space'.
46 Ibid, at [19]–[20].
47 Ibid, at [25].
48 (1988) 164 CLR 539; 78 ALR 69; 62 ALJR 240; BC8802597.
49 (2010) 29 VR 384; [2010] VSCA 222; BC201006631 at [23].
50 Ibid, at [27].

any vulnerability, there is no room for a duty of care to arise where the contractual relationship wholly defines the relationship between the parties. Bearing in mind the dicta of Kiefel J in *Barclay v Penberthy*[51] that vulnerability can arise through knowledge of the plaintiff's reliance, though vulnerability can arise otherwise than by reliance, this is also consistent with the approach taken by the High Court in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[52] and the NSW Court of Appeal in *Caltex Refineries (Qld) Pty Ltd v Stavar*.[53]

The Full Court of the Tasmanian Supreme Court considered the issue of whether a penumbral duty of care to avoid real or foreseeable economic loss might exist in *Doolan v Renkon Pty Ltd*,[54] in which a solicitor provided telephone advice to the director of a company. The director, an inexperienced client, had sought advice from the solicitor about a lease that her company had entered into as lessee. The land was burdened with a restrictive covenant forbidding the sale of liquor on the land, and in the lease agreement the owners had undertaken to lift the covenant within 2 years or the owners would surrender the lease and pay to the lessees $1 million, less some agreed deductions.

The director sought advice from the solicitor when she was sent notices from the Liquor Licencing Board. As a result of the terms of the lease, those notices in effect required the company to carry out considerable work at its expense which would have caused her company financial difficulties.

The Tasmanian Full Court considered the NSW and Victorian authorities referred to above and the circumstances in which a penumbral duty of care may be imposed. The Full Court held that it had been part of the solicitor's contractual retainer to advise upon the ways in which the lease could have been terminated. This arose from the following facts.

First, the client's request for advice had been imprecise and vague.[55] The client had made it clear that she wanted to know whether there was any way that she could avoid having to comply with the licensing notices. She had also made a vague enquiry as to whether the lease was 'in effect' or 'in place'. When she made that enquiry, she did not make it clear whether she wanted to ensure that the company's tenancy was not at risk, or whether she was interested in arranging for the lease to be terminated, or whether she was hoping there might be some opportunity for the company to renegotiate the terms of the lease. Those were all possibilities. There was evidence that the terms of the lease, especially in relation to expenditure by the tenant on capital works, were unusually onerous for the company. Despite the vagueness of the instructions, the solicitor had made no attempt to clarify or limit the scope of the matters upon which he was being asked to advise.

Second, the solicitor had been conscious that the lease would bind the company to carry out the work required by the licensing notices unless some

51 (2012) 246 CLR 258 at 321; 291 ALR 608; [2012] HCA 40; BC201207490 at [175].
52 (2004) 216 CLR 515 at 547; 205 ALR 522; [2004] HCA 16; BC200401482 (*Woolcock*) at [74].
53 (2009) 75 NSWLR 649; 259 ALR 616; [2009] NSWCA 258; BC200907980 (*Stavar*).
54 [2011] TASFC 4; BC201106937.
55 Ibid, at [41] where the court described the terms of the retainer as 'imprecise and vague'.

reason could be found for the company to avoid having to comply with the lease.

As nothing was done to clarify or limit the scope of the retainer, the court held that it was his duty to provide thorough advice in response to the questions asked by Ms Rees. In so finding, the court referred to Donaldson LJ in *Carradine Properties Ltd v D J Freeman & Co*:

> . . . the precise scope of that duty will depend inter alia upon the extent to which the client appears to need advice. An inexperienced client will need and be entitled to expect a solicitor to take a much broader view of the scope of his retainer and his duties than will be the case with an experienced client.[56]

By finding that the scope of the retainer incorporated the duty sought to be implied, the court side stepped the issue of whether a penumbral duty of care existed to advise beyond the limits of the retainer.

In *Provident Capital Ltd v Papa*,[57] the client provided her home (her only significant asset) from which she also conducted her business as security for two loans which were applied to her son's gymnasium business (in part to buy 'flashy new equipment from the States') and to repay an earlier debt of her son. The financier Provident Capital had advised the client to obtain independent legal advice regarding the loan and security documentation. The client had then retained a solicitor to provide independent legal advice concerning the two consecutive loan and security transactions. The gymnasium business subsequently failed.

The evidence of both the client and the solicitor was that in relation to the first loan and security transaction, the solicitor had not mentioned the financial circumstances of the gym business, or the fact that the interest rates charged for the loan were well above commercial rates and also had not enquired about the financial circumstances of the client nor about her ability to service the loan if her son or his company could not do so.[58] This was in circumstances where the solicitor had been aware that the business was a new acquisition and that Provident Capital had not required any verification of the means of repayment of the principal or interest components of the loan. The solicitor had previously acted in relation to another loan to the client's son at an interest rate of 8% per calender month and had also been aware that the client's son had had difficulty providing the rental bond for the gymnasium in a timely manner.

When the client provided her son with a second advance which in effect increased the existing loan facility by a further $100,000, the solicitor sent the client a letter confirming that 'the advice given to you previously both in conference and by letter . . . Regarding the original loan of $700,000 still remains valid'.[59]

It was not in issue that the solicitor had discharged his obligations under his

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56 (1982) 126 SJ 157. This was quoted with approval by Peter Gibson LJ, with whom Hobhouse and Leggatt LJJ agreed, in *National Home Loans Corporation v Giffen Couch & Archer* [1997] 3 All ER 808; [1998] 1 WLR 207 at 213. See *Doolan v Renkon Pty Ltd* [2011] TASFC 4; BC2011069373 at [36]–[37].

57 [2013] NSWCA 36; BC201300843 (*Provident*).

58 Ibid, at [37].

59 Ibid, at [47].

retainer. However, the court held that in the circumstances, the solicitor owed the clients a penumbral duty of care to avoid foreseeable financial loss. This arose from the fact that in the court's opinion, a reasonable solicitor in the position of Mrs Papa's solicitor would have formed the view that the client's home from which she also conducted her business would have been significantly endangered by her entry into the loan and security transactions. Macfarlan JA, with whom Allsop P and Sackville AJA agreed, held that the solicitor had to do two things to discharge the penumbral duty. First, the solicitor should have recommended that the client obtain independent advice, and second, the solicitor must 'advise his or her client of the *obvious practical implications* of the client's entry into [the] transaction[s]'.[60]

The latter requirement is inconsistent with the Court of Appeal judgment in *Citicorp v O'Brien* where the court had expressed in obiter that a solicitor should not be under a duty that required them to give opinions which they are potentially not qualified to give, and inform clients of their own personal views on financial transactions.[61] In the absence of factors such as assumption of responsibility and reliance, it is suggested that the imposition of such a requirement is burdensome and unreasonable.

In spite of lengthy consideration of the authorities on the existence of a penumbral duty, ultimately the question the court was called upon to answer in *Kowalczuk v Accom Finance Pty Ltd*,[62] as in *Dominic* and *David*, pertained primarily to whether or not the defendant had breached the terms of his retainer. This could have been strategic in light of the court's historical aversion to imposing the existence of a penumbral duty to avoid foreseeable economic loss. Within this analysis, Campbell JA explained the extent of a solicitor's duty to explain the 'practical effect' of the document consistently with the principle in *Citicorp v O'Brien*. Campbell JA in *Kowalczuk* made the distinction between a solicitor explaining how mortgage terms may operate in the particular circumstances of the client and a solicitor explaining mortgage terms in terms capable of being understood by the client by addressing the practical effect of the terms and how they might operate in hypothetical circumstances. However his Honour noted 'doing that does not involve the giving of financial advice, as its subject matter is the document that is being explained, not the financial wisdom or unwisdom of the client entering the transaction'.[63]

Provident appears to represent a significant shift in the NSW Court of Appeal in recognising the existence of a penumbral duty outside of the scope of the retainer. Although McFarlane JA distinguished *Provident* from *Dominic*[64] it would appear that the NSW Court of Appeal was demanding a broader scope of duty to the one enunciated in *Dominic* and *Kowalczuk*. This may be due to a more liberal reading of the duty to explain. The duty to explain seems to be no longer limited to the legal effect of the document, but

60 Ibid, at [80].
61 *Citicorp Australia Ltd v O'Brien* (1996) 40 NSWLR 398 at 418; [1996] ANZ ConvR 623; (1996) NSW ConvR 55-794; BC9605016.
62 (2008) 77 NSWLR 205; 252 ALR 55; [2008] NSWCA 343; BC200810918 at [301].
63 Ibid, at [296].
64 *Provident Capital Ltd v Papa* [2013] NSWCA 36; BC201300843 at [81].

now requires an explanation of the 'practical implications'[65] of the client's transaction.

Provident also marks a transferral of liability from lenders to solicitors. In *Provident*, Allsop P reasoned that:

> many clients look to and rely on an advising lawyer, not as the expounder of legal doctrine, but as the confidential advisor about the law, and its practical intersection with life. That is why they seek advice. That is why lenders require the interposition of the trained solicitor to give independent advice.[66]

Provident indicates that a solicitor will not have discharged his penumbral duty of care if a recommendation to obtain independent financial advice was not done in strong enough terms.[67] The manner and form in which such a recommendation is given must be appropriate for the particular circumstances of each case. A mere suggestion may not suffice. In some cases, the advice must be both oral and written and the solicitors must follow up on whether their recommendation has been acted upon. Additionally, if the clients are unsophisticated to the knowledge of the solicitor then the solicitor may be under an obligation to point out the obvious financial implications of the transactions they are intending to embark upon. This therefore required a solicitor to make a value judgment beyond the realm of his published competence.

One other practical implication of *Provident* is that there is a disincentive for solicitors to become familiar with their client's circumstances. It appears to potentially have the effect that solicitors with new clients who are not confronted with any specific features of the client's situation are placed in a protected position over those solicitors who have an ongoing relationship with their clients. This may have a negative impact on the overall quality of service the legal profession offers as solicitors shun information from clients in order to reduce any exposure to liability.

A recent case of the NSW Court of Appeal, *Zakka v Elias*,[68] concerned a solicitor, Ms Rahe who had been doing her friend, Mr Zakka, a favour when she witnessed some mortgage documents for him at her home. The loan transaction was clearly improvident and it was the evidence of Ms Rahe that she had told Mr Zakka that the transaction was risky, that he did not have adequate security, that the transaction was in fact a 'con' and that he could lose his house. Ms Rahe had warned Mr Zakka not to do any deals with the borrower and had also told him not to sign any loan documents. By that time however, Mr Zakka had already entered into the loan agreement and he was only seeking Ms Rahe's assistance as a witness of the mortgage transaction. Despite this, once Ms Rahe had witnessed the documents, she then communicated with lawyers for the lender on Mr Zakka's behalf and attended to the conveyancing aspects of the loan transaction. Mr Zakka accepted under cross-examination that he had not asked Ms Rahe for advice as to whether the investment was a 'good deal'. Mr Zakka had earlier said in cross-examination that he thought Ms Rahe would know and would tell him if it was a good deal.

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65 Ibid, at [80] (emphasis added).
66 Ibid, at [6].
67 Ibid, at [80].
68 [2013] NSWCA 119; BC201302456.

Critical to the finding of the existence of a duty of care was that Ms Rahe had previously helped Mr Zakka secure finance for a loan to her own brother. In the course of that first retainer, Ms Rahe had learned that Mr Zakka was unemployed and on a disability pension.

While there was no written retainer, the District Court held that Ms Rahe had been retained only to execute the mortgage. However, the Court of Appeal held that the knowledge that Ms Rahe had of Mr Zakka's personal circumstances ought to have put her on her guard. The court held that Ms Rahe owed Mr Zakka a duty to advise her client of the risks of the transaction, to seek independent financial advice and ask for security for the loan instead of just accepting an unregistered second mortgage as security. The court did add that in the circumstances there was no duty upon Ms Rahe to explain the terms of the contract in detail. A generalised warning in the terms described above would have sufficed. Ms Rahe breached this duty of care.

While the NSW Court of Appeal did not deem it necessary for Ms Rahe to have spelled out in detail the ways in which Mr Zakka might have lost his home, the court held that Ms Rahe was in breach of a duty of care to Mr Zakka in failing to draw to his attention that he should consider, or seek further advice as to, whether the security for the loan was adequate for his protection and that he should make sure, at the very least, that an appropriate caveat be lodged to protect his interest which could not be withdrawn without notice to him.

The court considered that those were matters that a reasonably competent conveyancing practitioner would have considered should be drawn to Mr Zakka's attention, even where the practitioner was not acting on the loan, since the practitioner was on notice of facts that raised these as potential risks. A solicitor in the position of Ms Rahe, however, was not required in the absence of a retainer to advise on those matters but was required to simply draw those issues to the client's attention as matters that the client would be advised to address.

Unfortunately for Mr Zakka, he could not prove that Ms Rahe's breach had caused his loss. Mr Zakka had already entered into the loan agreement prior to him asking Ms Rahe to witness the mortgage documentation and would have been liable for breach of contract if he had not advanced the loan monies. Moreover given the very clear warning that Ms Rahe had given Mr Zakka that the transaction was a 'con', Mr Zakka could not prove that he would have heeded any recommendation to obtain independent financial advice or to ask for security for the loan.

Although Mr Zakka was ultimately unsuccessful, the findings of the NSW Court of Appeal on the content of the solicitor's duty of care suggest increasing judicial acceptance of the existence of a penumbral duty in appropriate circumstances. In this case, despite the fact that there was no written retainer, and that the instructions the client gave to the solicitor were narrowly focused on executing mortgage documentation and did not include advising upon the prudence of such a transaction, the court was still comfortable imposing the existence of the penumbral duty of care.

The court's approach has undeniably been to allow justice to be tailored to the unique circumstances of each case. More recent cases show that courts will focus on the knowledge of the solicitor, specifically whether or not facts

become known during the execution of the retainer or an earlier retainer that put the solicitor on notice that the client's interests may be endangered or at risk.[69] A consideration of the 'facts which put him or her on notice' concurrently allows the unique circumstances of the case to be considered, but it does not take into account a number of other factors which may be useful. For example, what would be the position of a solicitor who was aware of the risky nature of the transaction, but was also dealing with a sophisticated client? The current approach of the courts may not necessarily take this factor into account. It is suggested that the multifactorial approach of the High Court identified in *Perre v Apand Pty Ltd*[70] and subsequent cases should be considered in this context.

The currency of the multifactorial approach

The majority of claims against solicitors are for economic loss.[71] In *Woolcock*, McHugh J set out five principles 'relevant for determining whether a duty exists in all cases of liability for pure economic loss'.[72] These principles — a mix of policy considerations and 'salient features' — are:

1. Reasonable foreseeability of loss;
2. Indeterminacy of liability;
3. Autonomy of the individual;
4. Vulnerability to risk; and
5. The defendant's knowledge of the risk and its magnitude.[73]

This approach was expanded upon in *Stavar*[74] where the NSW Court of Appeal outlined the multi-factorial approach to be taken in deciding whether or not a duty of care exists in novel circumstances.[75] A novel circumstance is a duty that does not fall within an accepted category of duty. A penumbral duty of care, which imposes a duty beyond anything contractually agreed to in a retainer with a client, can be seen to be a subset of this.

In *Stavar*, Allsop P outlined 17 salient features to be considered in determining whether a duty of care arises, including relevantly:

1. The foreseeability of harm;
2. The nature of the harm alleged;
3. The degree and nature of control able to be exercised by the defendant to avoid harm;
4. The degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
5. The degree of reliance by the plaintiff upon the defendant;
6. Any assumption of responsibility by the defendant;

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69 *David v David* [2009] NSWCA 8; BC200900572; *Provident Capital Ltd v Papa* [2013] NSWCA 36; BC201300843 and *Zakka v Elias* [2013] NSWCA 119; BC201302456.

70 (1999) 198 CLR 180; 164 ALR 606; [1999] HCA 36; BC9904592.

71 S Christensen and W D Duncan, *Professional Liability and Property Transactions*, The Federation Press, Sydney, 2004, p 182; *Hawkins v Clayton* (1988) 164 CLR 539 at 578; 78 ALR 69; 62 ALJR 240; BC8802597.

72 (2004) 216 CLR 515 at 547; 205 ALR 522; [2004] HCA 16; BC200401482 at [74].

73 Ibid.

74 (2009) 75 NSWLR 649; 259 ALR 616; [2009] NSWCA 258; BC200907980.

75 Ibid, at NSWLR 676, [103].

7. The proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
8. The existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
9. The nature of the activity undertaken by the plaintiff;
10. The nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
11. Knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
12. Any potential indeterminacy of liability;
13. The nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
14. The extent of imposition on the autonomy of freedom of individuals, including the right to pursue one's own interests;
15. The existence of conflicting duties arising from, other principles of law or statute;
16. Consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and
17. The desirability of, and in some circumstances, the need for conformance and coherence in the structure and fabric of the common law.

The multi-factorial approach outlined in *Caltex Refineries* is a generalised approach and applies to both pure economic loss and personal injury cases. It is an expansion of the approach taken by McHugh J in *Woolcock* which is specifically aimed at the implication of a duty of care in pure economic loss cases. The Court of Appeal has, however, cautioned that the list is not exhaustive and represents a 'universe of considerations'.[76] They are not to be considered a shopping list in that not every feature has to be satisfied prior to the implication of a duty of care. A couple of the features, however, have been treated as integral and a prerequisite to the implication of the duty of care. For example, there must be some element of control by a defendant and there must be some vulnerability in the plaintiff in some sense or other: *Makawe Pty Ltd v Randwick City Council*.[77]

The fact that so many potential factors may influence the decision concerning the existence of a duty of care may at first blush instil the multifactorial approach with the same lack of certainty as the current approach used to determine whether a penumbral duty of care exists. In *Stavar*, Basten JA recognised this problem and consequently held that the multifactorial approach should not be treated as a unifying formulation or approach. Instead, it should be seen as merely reminding people what should be taken into account to determine whether a duty exists.[78]

In many cases, the existence of assumption of responsibility on the part of the solicitor and known reliance on the part of the client will generally be enough to imply the existence of a penumbral duty of care. However, such an approach would not cover the field. For example, in *Provident*,[79] although there was no assumption of responsibility on the part of the solicitor, the court

76 Ibid, at NSWLR 676, [104].
77 (2009) 171 LGERA 165; [2009] NSWCA 412; BC200911622 at [21].
78 *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649 at 689–690; 259 ALR 616; [2009] NSWCA 258; BC200907980 at [168].
79 [2013] NSWCA 36; BC201300843.

held that there was a penumbral duty of care. Can the result in *Provident* therefore be explained in the context of the multifactorial approach and in particular the vulnerability on the part of the client that was known to the solicitor, bearing in mind that the High Court has held in *Barclay v Penberthy*[80] that vulnerability can arise in the form of known reliance on the part of the client?

In the context of whether to imply a penumbral duty of care to avoid pure economic loss to solicitors, it is suggested that in the absence of assumption of responsibility on the part of the solicitor and known reliance on the part of the client, a consideration of the five factors identified by McHugh J in *Woolcock* will provide a unified approach to this area of law. A developing body of case law in the context of pure economic loss cases should assist to alleviate the uncertainty that surrounds the circumstances in which the penumbral duty of care arises. It will also be in keeping with recent developments in the law of tort since *Perre v Apand Pty Ltd*.[81]

Vulnerability — The key issue

In *Woolcock*, the High Court stressed the importance of the concept of vulnerability as a prerequisite to the existence of a duty of care to exercise reasonable care and skill to avoid pure economic loss.[82] McHugh J, describing vulnerability as the critical issue, defined vulnerability as not where a plaintiff is exposed to risk; but where a plaintiff is unable to protect himself or herself from the risk of injury by reason of ignorance or social, political or economic constraints.[83] In the context of the penumbral duty of care, it is suggested that this would also be an appropriate inquiry. If the retainer does not expressly or impliedly include advice in relation to the matter, then tort law will impose responsibility in only limited circumstances. In the absence of vulnerability on the part of the client, a solicitor should not be found to owe the client or any other third party a penumbral duty of care. Such a result would be just and in keeping with the current law on the implication of a duty of care in pure economic loss cases.

The inquiry would involve questions of whether the clients were in a position, both as a product of their education and knowledge, and also their financial situation, to influence the contents of the duty of care to the clients. Critical, however, to the imposition of a penumbral duty of care if a client is found to be vulnerable in the *Woolcock* sense is that this vulnerability must have been known (either actually or constructively) by the solicitor.

A retrospective application of the multifactorial approach

Would the application of the multifactorial approach and in particular the factors identified in *Woolcock* to the cases referred to above have led to the

80 (2012) 246 CLR 258; 291 ALR 608; [2012] HCA 40; BC201207490.

81 (1999) 198 CLR 180; 164 ALR 606; [1999] HCA 36; BC9904592.

82 T Carver, 'Beyond *Bryan*: Builders' Liability and Pure Economic Loss' (2005) 29 *MULR* 270 at 284.

83 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 549; 205 ALR 522; [2004] HCA 16; BC200401482 at [80].

same outcome? As will become clear below, there are insufficient facts detailed in the various judgments to allow us to definitively answer this question. However, a consideration of the factors identified in *Woolcock* and in particular the issues of vulnerability to risk and the defendant's knowledge of the risk and its magnitude, demonstrate that a multifactorial approach to the implication of a penumbral duty of care could provide a principled and workable approach to this area of law. The consideration will be limited to these two key issues because it is generally uncontroversial that the risk of financial loss from entering into improvident financial transactions is reasonably foreseeable. There is also no real issue that the implication of a penumbral duty of care will open the floodgates or interfere with the autonomy of the individual.

Citicorp Australia Ltd v O'Brien[84]

The clients retained a solicitor to act on their behalf on a contract for the purchase of a residential property on the Central Coast, and also on the mortgage of that property. The solicitor also acted for the vendor and the financier in the mortgage transaction. The solicitor had unfortunately placed himself in a position of conflict by acting for all of the key players in the sale and mortgage transaction.

The degree of vulnerability of the plaintiff

The clients were unsophisticated investors. Even though there were special conditions in the contract for sale that could have provided them with some protection, the solicitor had not adequately explained the import of the conditions which in turn made it impossible for the clients to utilise them in order to protect themselves.[85]

The clients had very limited financial resources to enable them to protect themselves as well as a history of considerable financial difficulty in terms of meeting mortgage repayments.[86] This was evident to the solicitor. The level of their education also made it difficult for them to understand mortgage documentation and the meaning of many terms and conditions.[87] The clients had no business training or capacity to understand finance; they lacked economic sophistication and had no tertiary education.[88] These factors tend to indicate the presence of vulnerability. The solicitor also had knowledge of the financial circumstances of the clients.

It is suggested that *Citicorp* may have been decided differently using the multifactorial approach. An analysis of the facts leads to a strong indication that the clients were vulnerable to the actions of the solicitor. Furthermore, the existence of conflicts of duties and the existence of special conditions in the contract for sale which a solicitor advising on the purchase of a property should have been acutely aware of also creates a strong presumption in favour

84 (1996) 40 NSWLR 398; [1996] ANZ ConvR 623; (1996) NSW ConvR 55-794; BC960501.
85 *Citicorp Australia Ltd v O'Brien* (1996) 40 NSWLR 398 at 405; [1996] ANZ ConvR 623; (1996) NSW ConvR 55-794; BC9605016.
86 Ibid, at NSWLR 401.
87 Ibid, at NSWLR 405.
88 Ibid, at NSWLR 401.

of imposing a penumbral duty in this case.

Dominic v Riz[89]

Dominic involved a situation where a solicitor was retained to advise on loan and mortgage documents for her clients. During the course of meetings with the clients, the solicitor became aware of how the clients intended to invest the money from the loan. The solicitor advised the clients to seek independent legal and financial advice concerning the underlying financial transaction. There was clearly no assumption of responsibility on the part of the solicitor or any reliance on the part of the client.

Knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff

The degree of the solicitor's knowledge that the conduct would cause harm was addressed at length in the case. The solicitor accepted that she knew the transaction involved a big risk. She described the alleged returns as 'very high', yet refused to accept that the returns were 'patently absurd'.[90]

Dominic highlights a situation where the solicitor had constructive knowledge that the transaction involved big risk. Her knowledge was derived from the belief that risk existed because the rate of return was very high. However, the solicitor had no specific knowledge of the nature of the intended investment.[91] This is in contrast to *Provident* where it had been evident to the solicitor that the conduct would cause harm because he had actual knowledge of the destination of the loan funds and had been put on notice of specific financial problems associated with that investment.

The degree of vulnerability of the plaintiff

The solicitor advised the clients to seek independent financial advice. There is no evidence as to whether the clients were unable to seek such independent advice due to 'ignorance or social, political or economic constraints'. The court found that the solicitor was entitled to conclude that the clients understood what she conveyed to them. In the circumstances it is likely that the clients were not vulnerable in any relevant sense and if the multifactorial approach had been applied, the same result would have been reached.

Provident Capital Ltd v Papa[92]

As a preliminary point, there is no evidence in *Provident* that the solicitor had assumed any responsibility outside of the four corners of his retainer to the client. Instead the evidence was to the contrary. The solicitor had been retained to advise upon the loan and security documentation and he had discharged his duty to the client in that regard.

89 [2009] NSWCA 216; BC200906747.
90 *Dominic v Riz* [2009] NSWCA 216; BC200906747 at [79].
91 Ibid, at [79]–[82].
92 [2013] NSWCA 36; BC20130084.

The degree of vulnerability of the plaintiff

Was the client by reason of her social, economic or political situation unable to protect herself from the risk that she would go into default on the mortgage and lose her only substantial asset, which was not only her home but also the premises from which she was conducting a small business? The client does not appear to have been suffering from an economic or political disability. However, was she suffering from a social disability? The evidence does not reveal whether the client was educationally disadvantaged or whether there was any element of undue influence exerted by her son and we do not know exactly why the client decided to enter into the improvident transactions without securing some protection for herself. It is however clear that she had been persuaded by her son to support him and had not turned her mind to the realities of the situation as well as the possibility that the gymnasium business may not flourish. Such a stance of blind trust is not surprising for a parent to take. However, should a solicitor merely retained to advise upon the transactional documents be placed in the position of having to act as a guardian angel?

Knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff

It would be possible in some circumstances that a solicitor may not be aware of specific risks associated with a loan or mortgage transaction, such as where there is little history between the solicitor and client, and neither party offers nor requests detailed knowledge concerning the transaction, the client's underlying financial position, or the intended use for the funds.

However, this does not appear to be the position that the solicitor was in here. The solicitor knew that the loans funds were to be used to assist the client's son in his gymnasium business and that the business was in a precarious financial position. The solicitor had acted for a company that had lent money to the client's son at the extraordinary high interest rate of 8% per calendar month so that he could bail out the two former directors of the gymnasium business from loans they had entered into with 'loan sharks'.[93] He knew that repayments of the client's loan were to be made out of the income of the business and that the client had no involvement or security interest in the gymnasium business.[94] Finally, he knew that the property was the client's home and principal asset from which she also conducted a small business.

Furthermore, the solicitor was aware that the relationship between the client and her son to whom she was directing the borrowed money was probably influencing her decision-making process. These facts strongly indicate that the solicitor had the requisite knowledge that if the business defaulted upon the loan repayments then the client would lose her home.

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93 *Provident Capital Ltd v Papa* [2013] NSWCA 36; BC201300843 at [16].
94 Ibid, at [79].

Zakka v Elias[95]

It is arguable that Ms Rahe had assumed responsibility to Mr Zakka to avoid the real or foreseeable consequences of financial loss. She had told him that he did not have adequate security, that she thought the transaction was 'a con', had in fact advised him not to enter into the transaction and had even warned him that he might lose his house if the business into which the loan funds were to be directed failed. However, there appears to have been no reliance upon Ms Rahe. I suggest that this arises from the fact that despite Mr Zakka's evidence that he believed that Ms Rahe would have told him if she thought that the transaction was not a 'good deal', Mr Zakka disregarded Ms Rahe's cautions against entering into the transaction which she had openly described as 'a con'.

The NSW Court of Appeal based their finding of the existence of a penumbral duty of care on the fact that Mr Zakka to the knowledge of Ms Rahe, was unemployed, on a disability pension and was at risk of losing his home if the borrower defaulted on the loan. There are no further factual findings that assist us in making an assessment as to whether Mr Zakka was under a social, economic or political disability. We do not know the nature of his disability. However, it may be that a further exploration of the circumstances of Mr Zakka would have revealed that he was vulnerable in the relevant sense.

A review of the cases above reveal that where the critical factors of vulnerability to risk and knowledge appear to be satisfied, it is likely that the Court of Appeal applying the multifactorial approach would have reached the same results in these cases (other than in *Citicorp*)[96] and imposed a penumbral duty of care to avoid real or foreseeable economic loss upon the solicitor.

Approach in the United Kingdom

English courts have taken the approach of rejecting the existence of the penumbral duty of care. Instead, the English courts have interpreted the scope of a lawyer's retainer to extend to informing a client of a risk of which the lawyer becomes aware during the course of their retainer. This is reminiscent of the approach that the NSW Court of Appeal had taken prior to the recent decisions of *Provident*[97] and *Zakka v Elias*.[98]

In *Credit Lyonnais SA v Russell Jones & Walker (A Firm)*[99] a solicitor's duty owed to a large European bank extended to warning the bank about a clause requiring payment as a condition precedent for a break option in a lease. Construed narrowly, the solicitor's instructions did not extend to providing advice on the meaning of the clause, nonetheless the court held that the scope of the solicitor's retainer could be interpreted to include the warning. Laddie J explained:

> He is under no general obligation to expend time and effort on issues outside the retainer. However if, in the course of doing that for which he is retained, he becomes

95 [2013] NSWCA 119; BC201302456.
96 (1996) 40 NSWLR 398; [1996] ANZ ConvR 623; (1996) NSW ConvR 55-794; BC9605016.
97 [2013] NSWCA 36; BC201300843.
98 [2013] NSWCA 119; BC201302456.
99 [2002] EWHC 1310 (Ch).

> aware of a risk or a potential risk to the client, it is his duty to inform the client. In doing that he is neither going beyond the scope of his instructions nor is he doing 'extra' work for which he is not to be paid. He is simply reporting back to the client on issues of concern which he learns of as a result of, and in the course of, carrying out his express instructions.[100]

This reasoning was taken further in *Gabriel v Little*,[101] in which a solicitor was aware that his client had been mistaken as to the purpose of a loan he was extending to a third party, but had failed to correct his client's misconception. The duty to warn the client of the deception was held to be within the scope of the solicitor's retainer. In both cases the knowledge of the solicitor of the client's risks were key, not to finding the existence of a penumbral duty, but to extending the existing duty owed by a solicitor under a retainer.

Conclusion

The current approach to determining whether a penumbral duty should exist in given circumstances lacks clarity and consistency. A consideration of the factual scenarios of cases where a penumbral duty of care to avoid real or foreseeable risk of economic loss indicate that the multifactorial approach may provide the clarity and consistency that has been lacking. The multifactorial approach incorporates much of what is currently being done by the courts in penumbral duty of care cases into a more organised and consistent principle. It focuses the inquiry, vulnerability being at the crux of the investigation. The very fact that the concept of vulnerability is such an encompassing principle is why it would lend itself so effectively to cases dealing with the penumbral duty of care. These cases have sought to determine the existence of a duty of care based on a broad array of factors such as the solicitors' knowledge and assumption of responsibility, and the clients' reliance, and the extent to which solicitors have recommended, and in what terms, that clients seek independent advice from independent sources.

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100 Ibid, at [28].
101 [2012] EWHC 1193 (Ch).