

Tim Faulkner SC and Grainne Marsden appear in successful Court of Appeal matter

The New South Wales Court of Appeal (per Harrison CJ at CL, with Bell CJ and Gleeson JA agreeing) last week [published *Bluth v Boyded Industries Pty Ltd* \[2024\] NSWCA 67](#). Tim Faulkner SC and Gráinne Marsden appeared for the appellants, HWL Ebsworth (HWLE), and were instructed by Gilchrist Connell.

HWLE acted for Boyded in the sale of land to the Gateway Group. The sale was completed in May 2017 and a Deed of Call Option that allowed Boyded to purchase a proposed parcel of land known as the car showroom was executed. Crucially, the Deed also contained a clause that gave Boyded a right to \$3.5 million if the car showroom was not ready for development by 15 May 2020.

The Deed contained an express prohibition on Boyded lodging a caveat over the land and allowed Gateway to terminate the Deed if Boyded did so. When Boyded instructed HWLE to lodge a caveat over the land, HWLE negligently failed to advise that doing so was prohibited by the Deed. Boyded successfully sued HWLE in 2023 for negligence and breach of retainer.

The Court upheld the appeal on three grounds related to causation. The Court held that the primary judge erred in finding that HWLE's failure to advise Boyded against lodging the caveat caused it to lose an opportunity of some non-negligible value, being the right to rescind the Deed. The primary judge was required to consider whether Gateway and the guarantor of the land were both willing and able to pay Boyded \$3.5 million should they rescind the Deed.

The Court held that while Gateway and the guarantor were willing to pay, there was no evidence rising higher than speculation or surmise they had an ability to pay the \$3.5 million. Therefore, without more evidence, the primary judge was incorrect to hold that Boyded's loss of the opportunity to exercise its right to rescission had been shown to have some value.