PROFESSIONAL NEGLIGENCE BRIEFING
2012 CASE ROUND-UP

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The Three Wise Men: honesty, reasonableness and fairness - Section 61, Trustee Act 1925

Lenders are embracing breach of trust arguments in what would otherwise be traditional negligence claims with fervour. Does it have something to do with lenders’ fear of their previous risky lending practices coming back to the bite them in the form of hefty findings of contributory negligence? Where the transaction has not completed there are significant advantages for a lender in seeking to reconstitute the trust fund rather than to bring a contractual or tortious claim for damages.

What can the solicitor do when faced with such a challenge? Section 61 enables the court to relieve the trustee, wholly or partly, from personal liability for a breach of trust if he or she “has acted honestly and reasonably, and ought fairly to be excused for the breach of trust.”

For the solicitor defending a lender claim is the relief available under section 61 real or illusory? After Nationwide v Davisons Solicitors (A Firm) Unreported, April 24, 2012, QBD. The Seller’s solicitors, RS, wrote to D from an office address in Small Heath. D checked with the Law Society and SRA websites and the firm, which did exist, apparently had such a branch. However the firm had previously complained about an imposter using its name. It had no branch in Small Heath but the websites had not been amended. The Judge found that RS had given at best a future undertaking to redeem or obtain discharges for existing charges. The monies were paid to RS’s office and the charge on the property was not discharged. The lender has a unilateral notice ranking behind the first charge. The Judge refused relief under section 61 on the basis that RS’s assurance fell far short of giving an undertaking. D had not acted reasonably.

The Court of Appeal reversed this decision. (1) RS had given a sufficient undertaking by providing requisitions to title albeit not on the correct form but nevertheless confirming that they would comply with the Law Society’s Code for Completion by Post. Therefore D had obtained the benefit of an undertaking from someone he reasonably believed to be the seller’s solicitor. A solicitor has to act reasonably that does not necessarily mean that he must have complied with best practice in all respects. Relief was granted to D. (2) The lender argued that there was an absolute obligation on a solicitor to procure on completion redemption of all existing charges.
and a fully enforceable first charge. It relied on paragraph 5.8 of the CML Handbook which requires a solicitor to obtain this. That would impose the equivalent of a guarantee on D. Paragraph 5.8 imposes an obligation to exercise reasonable skill and care in seeking to procure the outcome it refers to. There was no breach of retainer.

Fortunately the decision has averted the star collapsing further and the Three Wise Men are now following the right star.

Claims against Solicitors

This year has seen three interesting cases heard in the Court of Appeal regarding different allegations of professional negligence against solicitors. In summary:

- in *Langsam v Beachcroft LLP*, it was held that a solicitor’s “excessively cautious advice as to settlement of a claim”, was not in itself professionally negligent where it was premised upon non-negligent advice given by leading counsel. The case also held that in the circumstances, a six-month delay in delivering judgment had not affected the judge's findings of fact or law;

- in *Swain Mason v Mills & Reeve*, it was held that a firm of solicitors was not under a duty to advise on the adverse tax consequences that would arise on the death of a client, in circumstances where he had not asked for any such advice, and the death occurred during a routine medical procedure and which the solicitors only knew of by chance. Also it was held that a decision not to accept an offer to mediate does not automatically have adverse costs consequences; and

- in *Lloyds TSB Bank Plc v Markandan & Uddin*, a firm of solicitors, when acting on behalf of a mortgage lender on the sale and purchase of a property, had committed a breach of trust when it transferred a mortgage advance to the vendors’ purported solicitors without receiving the requisite documentation or a solicitor’s undertaking. Whilst the solicitors were themselves a victim of the fraud, and thus relief could be afforded to a solicitor in such cases pursuant to section 61 of the Trustee Act 1925, it was right not to order it in the instant case due to inexcusable failings by the solicitors.

*Langsam v Beachcroft LLP* [2012] EWCA Civ 1230

B had acted for L in his claim for professional negligence against his former accountants alleging that, had he been properly advised, he would have entered into an equity relationship of partnership assets.

At first instance ([2011] EWCA 1451 (Ch)), the judge found that the critical advice was given by leading counsel, that the settlement figure suggested was not negligent. He found that B had not been negligent in handling witnesses or obtaining valuations. L’s claim was therefore dismissed.

L appealed. He contended that B remained under a positive duty to give advice once leading counsel had been instructed and owed him a duty to indicate the spectrum of the loss he might recover, not simply, provide a low-end figure. He challenged specific findings of fact made by the judge and submitted that the delay in giving judgment had affected those findings and caused him to omit certain evidence.

The appeal (and a cross appeal as to the dismissal of B’s counterclaim for unpaid fees) was dismissed by the Court of Appeal (Arden, Patten, Longmore LJJ):

1. (Longmore LJ dissenting) The fact that a solicitor gave advice consistent with the advice previously given by leading counsel when leading counsel was not present did not mean that he had accepted an independent duty and that the relationship had changed from what it was when leading counsel gave his advice.

2. (Per Longmore LJ) B did not seem to have ceased giving advice once counsel was instructed. If advice on the quantum of the claim had been negligent - which it was not - B should have been responsible for that negligence, no doubt jointly with counsel.

3. If the advice given to L was not negligent, it would be wrong to hold that it was so because it did not give a more optimistic view of what he might recover at trial. There is no duty to provide a spectrum of figures as to the loss likely to be recovered if a case proceeded to trial.

4. The judge’s findings of fact were unimpeachable.

5. An appeal might be allowed where, in the light of a delay in delivering judgment, the court could not be satisfied that the judge came to the right conclusion (*Bond v Dunster Properties Ltd* [2011] EWCA Civ 455) but that was not the case here.

*Swain Mason v Mills & Reeve* [2012] EWCA Civ 498

SM were the executors and daughters of a businessman (B) who owned a successful business in which his daughters held shares. B no longer worked full-time in the business and had a history of heart problems. A management buy-out of the business was proposed and MR also gave tax advice to B and his daughters about the buy-out. The management buy-out was completed by way of a share purchase agreement and shortly afterwards B died while undergoing a planned heart procedure. B’s death soon after the buy-out gave rise to adverse inheritance and capital gains tax consequences. MR had not given advice as to the tax consequences in the event of B’s death.

SM’s case was that had due advice been given the buy-out would have been deferred until after the heart procedure had taken place, thereby avoiding the tax consequences arising on B’s death.
The judge ([2011] EWHC 410 (Ch)) found that in general, MR was under a continuing duty to advise SM in the light of changing circumstances. However, MR learned about the heart procedure by chance and the information it received did not suggest that the procedure was other than routine. Further it was held that B did not ask for advice and there was no duty on MR to advise deferring completion of the buy-out until after the heart procedure. The judge dismissed the claim and ordered SM to pay 50% of MR's costs. The rationale for this reduction stemmed from M's refusal to enter into mediation as proffered by SM.

SM appealed and MR cross appealed as to the judgment on costs.

The Court of Appeal (Lord Neuberger MR, Richards & Davis, LJ) dismissed the appeal and allowed the cross appeal in part:

(1) The judge was correct to dismiss the claim for the reasons given. He was correct also in attaching great weight to the fact that an e-mail indicating the forthcoming operation only reached MR by B subsequently copying him in on it, and when B was not seeking or asking for any advice in the light of the forthcoming procedure. Whilst M knew that B had a history of ill-health, there was nothing to indicate that the procedure mentioned in the e-mail carried any significant risk.

(2) The judge had erred in holding it against MR that it declined to enter into mediation. Where a party reasonably believed that he had a watertight case, that might well constitute sufficient justification for a refusal to mediate ([Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576]). That remained the case even if on some issues the defence did not succeed. It had not been shown by SM that MR had acted unreasonably in refusing to agree to mediation. Exercising the discretion afresh, but respecting the judge’s conclusion on the other issues, MR should have 60 per cent of its costs of the proceedings.

Lloyds TSB Bank Plc v Markandan & Uddin (A Firm) [2012] EWCA Civ 65

For an in depth consideration of this case please see the June 2012 Professional Negligence Briefing in which this case is examined by Zachary Bredemear.

Shepherd Construction Ltd. v Pinsent Masons LLP – The Good Shepherd?

You will probably have seen Shepherd signs on many of the construction projects in Central London (if like me you look at these signs).

Shepherd have also been busy, however, in the field of litigation, in particular in a claim against their former solicitors. Said solicitors have now become Pinsent Masons LLP. Shepherd have been arguing that its Solicitors should have advised them about how a change in the law affected their extant contracts, by virtue of a form of ‘ongoing’ duty since they often had dealings with their solicitors. The case was complicated by the fact that Pinsent Masons had evolved out of the three firms which Shepherd had contracted with. Nevertheless, Shepherd argued that the net effect was that a ‘Single Contract’ existed between the parties.

This issue came before Akenhead J on the 19th of January this year as part of a strike out application. Pinsent Masons argued that their duties were governed by contract, which did not require them to review previous advice on a regular basis as was contended by Shepherd.

The judge agreed with Pinsent Masons. He held that the contract was the framework which set out the parties’ obligations and on these facts little further need be added. There was no obligation to provide advice when such advice had not been expressly requested or paid for.

Whilst many lawyers flocked to read the judgment and found good cheer therein, it must be noted that there are instances when some form of continuing duty could be implied for a professional. These would include when, for example, an architect produces plans which would need to be reviewed upon material developments (subject to disclaimers), or where there is a family solicitor on a retainer with an understanding that advice would be given from time to time.

The case raised the spectre of lawyers somehow regularly having to review previous advice with ongoing clients. This simply does not reflect the current law on professional liability. The argument was a construction which even Shepherd has not managed to build, so far.

About the Authors

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