LIVING ON THE EDGE

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INTRODUCTION

1. An accusation of negligence against a firm of solicitors is quite inimical to the popularist impression of prudence that characterises the legal profession. So is the concept of "taking a risk". But the culture of some firms is one of systemic risk taking (e.g. accepting volume instructions with inadequate resources to service them); in other cases the firm does not appreciate the risks to which its mode of business exposes it (e.g. accepting instructions without properly defining the scope of the retainer). Examples of risk taking are many and varied.

2. In this paper we want to look at a number of risk areas –which may or may not already have been identified as such by the reader – that show ways in which firms can be seen to be 'living on the edge' i.e. operating at what we will call the "margins of competence". In offering the analysis which we do below we are acutely conscious that counsel are as much at risk of claims challenging their professional judgment and conduct of instructions as are firms of solicitors. We are therefore equally anxious to develop a more acute sense of risk awareness. Exposing the types of conduct discussed below that prompt claims will thus hopefully prove a mutually beneficial exercise.

3. We will focus on three issues: The first is the identity of the client - by whom is the firm retained and to whom does it owe a duty of care? We will call this "retainer creep". The second is the identity of the appropriate Defendant to the negligence claim ie the individual or the firm? The third is the risk involved in assuming, deliberately or otherwise, a duty to give competent advice on the fringes of one's practice area - or "the competence comfort zone."

ISSUE 1: RETAINER CREEP:

(A) Who is the client?

4. At the outset of any retainer it is axiomatic that the identity of the client must be established. It is the client to whom duties of care will be owed. It might be thought that the identity of one's client is straightforward and yet the former Guide to the Professional Conduct of Solicitors recognised at paragraph 12.02: '*In some cases it is difficult for a solicitor to determine who is his client'*.

(i) Accepting instructions from an 'agent'

5. *Al-Sabah (Sheikh Ahmed Jaber) v Ali (Fehmi Mohamed) v Brain & Brain* (a firm)[1] is a good example of the consequences of a firm's failure to ensure that the instructions it received emanated from its client. Brain & Brain had acted in a number of transactions for Sheikh Ahmed who operated in the UK through his agent Fehmi Mohamed Ali. In one set of instructions – given by Mr Ali – a transfer of 55 Cumberland Mansions was affected from the name of Sheikh Ahmed into the name of Mr Ali who prompted charged the property to a lender for a considerable sum and then disappeared with the proceeds of the mortgage advance. In an action by Sheikh Ahmed against Brain & Brain an issue arose as to the firm's entitlement to rely on Mr Ali's authority to instruct it on behalf of Sheikh Ahmed – an issue resolved against the firm. Ferris J held:

   "… It is clear that a solicitor cannot properly act for a client unless he has instructions from the client so to act. It is the solicitor's duty to satisfy himself that he has been so instructed. If instructions come to a solicitor not from the client himself but from a third party claiming to represent the client, the solicitor needs to take special care to satisfy himself that the client wishes him to act, by seeing the client personally or obtaining written confirmation from the client or taking some other step which is sufficient in the circumstances, to show that the client wants

[1] Ch D (unreported), 22/01/1999

the solicitor to act for him in the matter in question … In my judgement a solicitor who fails to act in accordance with this principle … will be liable in negligence." [2]

For a more recent example of solicitors being duped by a rogue impersonating a 'client' so as to secure the fraudulent transfer of a property see *Nouri v Marvi*.[3]

(ii) *Accepting instructions from 'joint clients'*

6. Many circumstances arise in which firms are called upon to act for two or more 'clients'. A failure to ensure the interests of each are separately addressed is frequently productive of negligence claims. We give some of the more common examples of this problem below.

Married couples

7. In the above case Brain & Brain also acted on both sides of the transaction. This feature served further to increase the risk of a claim arising. Despite the consequences to a firm demonstrated by cases like *Al-Sabah* it is common to find firms acting in transactions involving married couples without clearly obtaining the authority of each partner to implement the relevant transaction. An example is *Linaker v Keith Turner & Ashton*[4] where the Claimant's wife instructed the Defendant firm to act on a re-mortgage of the family home; title to the property was registered in the husband's name alone. The court found the husband had never given the wife authority to instruct and she lacked ostensible or apparent authority to act on his behalf.

Co-Owners

8. Another common place scenario productive of claims centres on firms that act on the purchase of a property for prospective co-owners who are contributing unequally to the purchase price. The interests of each prospective co-owner may well diverge and not in the result be properly reflected in the terms on which the property is then expressed to be held. The Law Society Conveyancing Handbook Guidance states quite clearly (inter alia) that it is "essential to clarify the client's intentions as to the method of ownership" (A.9.1.1); the firm "shall explain the different methods of co-ownership in language appropriate to the client's understanding" and retain on the file a note of the client's wishes and the steps taken to implement the instructions; that "prospective co-owners who are not married would usually be advised to hold on a tenancy in common" (A.9.6.2). A failure to follow the above guidance is very likely to result in a successful negligence claim[5] from the co-owner who inadvertently ends up making an unintended gift of value to his/ her partner the full appreciation of which only emerges when the couple later split up.

Joint Clients

9. The risks that arise here are well illustrated by *Farrer v Copley Singletons*[6] where the firm acted on the purchase of a property by two couples, passing advice from time to time through one of the four individuals. In the result, advice over the existence of one particular encumbrance did not reach one of the couples, whose subsequent claim to damages succeeded. Brooke LJ observed:

> *"[The solicitors'] contract of retainer is with each and every client; the duties of a solicitor are owed and must be discharged to each of them. It must follow that a solicitor is entitled to communicate with and take instructions from only one of several clients only if he has the authority of the other client to do so … from the point of view of [the solicitor] the authority must be actual, whether express or implied, or apparent; but in each case the authority must emanate from the alleged principals, not the alleged agent."*

[2] See also Penn v Bristol and West Building Society [1995] FLR 938 at 948 per Judge Kolbert; see also by analogy the Law Society Conveyancing Handbook at A21.2.3.2 - duty to see client alone and take instructions directly; G1.1.1(i) - duty to account to client for balance of completion money in accordance with his instructions
[3] [2010] PNLR 99
[4] (5 November 1998, unreported)
[5] See Omega Trust Co Limited v Wright Son & Pepper (No. 2) [1998] PNLR 337 at 347(d) -348(d)
[6] [1998] PNLR 22.

10. However, Farrer was distinguished by the Court of Appeal in *Berlevy v Blyth Dutton*[7] where a father sued the solicitors who had been instructed on his own and his son's behalf by his son, who was also his business partner. The solicitors never communicated directly with the father and gave their advice to the son. The Court of Appeal held that there was no limitation on the son's authority to seek and receive the solicitor's advice on behalf of his father as well as himself and once it was accepted that a partner was instructing a solicitor and seeking their advice on behalf of other partners, then any advice should be treated as having been given to all the partners, even where the transaction was risky. Otherwise solicitors would be put in an impossible situation if they were required to write to all partners rather than deal with the one partner they were accustomed to dealing with.

11. A not dissimilar problem arose in *Such & Such v Everett & Co*[8] where the firm acted for Mr and Mrs Such and two of their business partners, Messrs Collett and Pain in a property transaction. The Claimants - Mr and Mrs Such - intended to transfer part of their business premises adjoining property belonging to Messrs Collett and Pain into the joint names of all four parties; instructions were largely given by Mr Collett on behalf of all four individuals. In the result which happened, the firm was instructed to arrange a transfer into all parties' names of both the plot of land intended by the Such's to be transferred and a parcel of land which they had intended to retain. In proceedings to have the transactions later set aside, so far as the retained land was concerned, the Court ordered rectification; Everett & Co, however, was found liable to pay damages in respect of the costs incurred by the Claimants in pursuing the claim to rectification. The solicitor acting in the transaction never took steps to confirm Mr Collett's instructions with Mr and Mrs Such and did not interview them separately.

Family members

12. Likewise it is the authors' experience that firms often accept instructions involving elderly clients and their off-spring in which the family home ends up being transferred to a son or daughter for nil or less than market value consideration. Whatever may have motivated the initial transfer it is not uncommon that it later becomes the subject of a negligence claim by the parent who alleges that the firm ought to have advised against a transfer and done more to protect his interests. Often instructions are accepted to act on the transfer from the child alone where the firm clearly knows that the transferring parent is unrepresented. No warning or recommendation is given to the parent to seek independent advice.

13. Even where the firm does recognise the parent as a client inadequate advice is given to ensure his interests are properly protected. Thus, in the Guidelines in respect of Gifts of Property published by the Law Society,[9] it is noted:

> 'The solicitor's role is more than just drawing up and registering the necessary deeds and documents to effect the making of the gift. S/he has a duty to ensure that the client fully understands the nature, effect, benefits, risks and foreseeable consequences of making the gift. The solicitor has no obligation to advise the client on the wisdom or morality of the transaction unless the client specifically requests this'.

14. In establishing the level of the client's understanding the Guidelines list a number of relevant factors – including whether the donor understands that the money or property they intend to give away is theirs in the first place; why the gift is being made; the extent of the gift in relation to the rest of their money / property; whether they expect to receive anything in return and if so how much or on what terms; the effect that making the gift could have on their future standard of living; the effect that the gift could have on other members of the family who might have expected eventually to inherit a share of the money or property; the risk the donor and recipient could fall out and even become quite hostile.

[7] [1997] E.G. 133
[8] 9 June 2005, Birmingham Mercantile Court (unreported).
[9] See section V.12 of the Conveyancing Handbook.

(iii) Costs risks

15. Acting for 'clients' on the basis of the assumed authority of an agent can also lead to a liability in adverse costs for the firm where is emerges that the entity for which the firm holds itself out as acting did not in fact give instructions. A common example is that of the urgent instructions provided by the company secretary to a developer for the obtaining of an injunction against trespass or interference with a building project: if the company secretary lacks authority to instruct proceedings to be brought in the name of the company, they will be liable to be struck out and an order for indemnity costs made against the solicitors acting*: Daimler Co v Continental Tyre Co.*[10]

(B) Duties owed to non-clients

16. Even where the firm has taken care to identify accurately and consider separately the interests and possibly differing needs for advice of two or more clients, it may become exposed to claims by non-clients who are able to demonstrate that the firm undertook some duty to them. This is an area where the courts have proved increasingly willing to extend the boundaries of conventional liability. As consideration of the following examples will demonstrate, it is not necessarily sufficient to avoid liability for the firm to inform the 'non-client' in writing that it is not acting for him and that he ought to consider obtaining independent advice.

17. Solicitors preparing contract documents for their clients and 'non-clients' are at particular risk. This is well illustrated by a collection of decisions from British Columbia and Ontario:

    17.1 *Burman's Beauty Supplies Limited v Kempster*[11] where the Court held a mortgagor's solicitor liable to the lender for failing to warn that the borrower client was offering a valueless second charge over certain chattels, rather than a valuable first charge which the solicitor knew or ought to have known the lender was expecting to receive (the solicitor was the first mortgagee and the charge prepared for the borrower client contained no hint of a prior encumbrance);

    17.2 *Tracy v Atkins*[12] where the Defendant solicitor was the only lawyer involved in a real estate transaction in which the Claimants were vendors; the Defendant was acting for the purchaser of the property. The original instructions were for the purchase price to be provided by an initial down payment, with the balance funded by means of a first mortgage back. Prior to completion, the purchaser told the Defendant that the deal as structured had fallen through but that there was now to be a further charge over the property to fund the initial payment with the balance secured by means of a deferred second charge back to the vendor. The Defendant firm took no steps to verify this account with the vendor and prepared a charge back which did not refer to the first charge. Predictably, the purchaser defaulted and disappeared. The first mortgagee's sold and the Claimants lost their equity in the property. Nemetz C.J.B.C. stated:

        "I have no difficulty in finding the solicitor here liable since he had undertaken the responsibility of affecting the conveyance of the property and should have known that the [Claimants] were relying on him to carry it out and to protect their interest. This was sufficient to establish the duty of care";

    17.3 *Clarence Construction v Lavallee*[13] where (again) the Defendant solicitor was acting for a lawyer involved. There was to be initial cash payment with the balance of the price funded by a second mortgage. The first mortgage was intended to be building mortgage, rather than a straight mortgage. The result of the transaction was to cause loss of value to the Claimant vendor. Carruthers J.A. found the solicitors liable for the loss:

[10] [1916] 2 AC 307, HL.
[11] (1974) 4 O.R.(2d) 626.
[12] (1979) 105 D.L.R. (3d) 632 (British Columbia).
[13] (1981) 132 E.L.R. (3d) 153 (British Columbia).

"Assuming that the vendor was not the appellant's client and that there was not a direct solicitor/client relationship between them this change in the terms of the agreement the appellant was documenting, whether done deliberately or negligently, gave rise to a duty to inform the vendor of this change or at least that the vendor be independently advised."

18. In as much as the English courts tend to 'catch up' with developing commonwealth jurisprudence, this area affords no exception. In *Searles v Cann & Hallett*[14] an investment adviser, Howard Baker, agreed to invest monies deposited with him for the Claimants, offering as security a second charge over his home. The task of preparing the charge document was entrusted to the Defendant firm, which at all times acted solely for Mr Baker. In the events which happened, the solicitors negligently omitted to prepare the charge prior to Mr Baker's bankruptcy. Any prospect of recovery that the Claimants may have enjoyed from being secured creditors was accordingly lost. The Claimant therefore sought to establish a liability for this negligent omission as against the solicitors, who at all times acted by an employed legal executive, Mr Partridge. In dealing with the existence of a duty of care in tort, the court held:

    "On the assumption that I am right in finding there was no retainer, it becomes of vital importance to the [Claimants] to see whether a duty of care in tort arises from the relationship between them and Mr Partridge … [counsel] submits that it does and had the same scope as it would if there were a contract … It cannot be fair to impose a duty of care which would be in conflict with a duty to the client in contract. I see no difficulty about this when it is realised what the non-client can reasonably expect and rely on. It is simply this, that where a solicitor knows there is a concluded agreement between his client and the third party, and that both are expecting him to produce documents to carry it into effect, he should do so carefully and in accordance with that concluded agreement, unless a variation is also agreed by both parties and confirmed in some way."

19. It will be apparent that in circumstances factually similar to those mentioned above, a failure to prepare in a timely fashion an agreement reflecting the understanding the solicitor reasonably concludes the non-client has at the time will not be relieved by an earlier recommendation to the non-client to seek professional advice of his own.

20. These cases may be contrasted with the recent decision in *Frank Houlgate Investments Co Ltd v Biggart Baillie LLP*[15] where a firm acted for a fraudster in connection with a number of mortgage advances arranged by him whilst impersonating the true owner. An attempt to pin liability on the firm by the lenders failed. The lender's attempt to rely on the firm's alleged failings to implement Money Laundering Regulations also failed.

21. Lord Drummond Young summarised the position thus:

    21.1. A solicitor acting for one party in a transaction will not normally owe any duty of care to the other party. The primary reason for this is that the solicitor is not instructed to act for that other party; he acts for his own client, and his dealings with the other party are conducted on behalf of that client. The other party will normally instruct his own solicitor to look after his own interests, and it is that solicitor who will give him such advice or make such inquiries as may be required. In these circumstances it is not generally fair or reasonable that a solicitor should be under any duty of care to the other party: *Gran Gelato Ltd v Richcliff (Group) Ltd.* [16]

    21.2. An exception to the foregoing rule may occur where a solicitor acting for one party chooses to answer an inquiry made of him by the other party where he can be said to have undertaken responsibility towards the other party. Whether that requirement is satisfied will depend upon the circumstances of the particular case. If the solicitor grants some form of certificate, or appears to undertake the task on his own initiative, it may be easier to draw the inference that responsibility has been undertaken. If, by

[14] [1999] PNLR 494 QBD.
[15] [2010] PNLR 235
[16] [1992] Ch 560

contrast, the solicitor does no more than pass on information provided by his client, and presents the information as so provided, the inference will be much more difficult: See *Allied Finance and Investments Ltd v Haddow & Co*[17] *and McCullagh v Lane Fox & Partners Ltd*.[18]

21.3. The general rule relates only to a solicitor's duty of care. If the solicitor becomes aware of dishonesty on the part of his client that amounts to a fraud on the other party to the transaction, he will plainly be under a duty to ensure that he does not further that fraud in any way. If he does anything in furtherance of the fraud, he will be liable to the other party to the transaction as a participant in the fraud: See *Primosso Holdings Ltd v Alpers.* [19]

21.4. Averments based on the Money Laundering Regulations are irrelevant. Those Regulations impose stringent regulatory requirements on solicitors and others who deal with the transfer of funds, but there is no suggestion in the Regulations that they impose any civil liability. Their function is regulatory; if there is a breach of the Regulations criminal sanctions are imposed, but such breach does not give rise to any liability in damages.

(C) Exposure to 'reflective loss' claims

22. A further area of exposure to claims that can lead to unexpected liability to a non-client arises in connection with claims to recover reflective losses. *Webster v Sanderson Solicitors* (a firm)[20] is a good recent example where an individual Claimant invested substantial sums of money in an overseas project in his own name and by procuring (1) further advances to be made by a company of which he was a 99% shareholder and (2) by the trustees of a pension fund of which he was the principal beneficiary. The claims made otherwise than in a personal capacity were struck out but the analysis of the Court reveals that there are circumstances in which such third party losses may well be pursuable by the individual Claimant. A brief synopsis appears below:

(i) Company losses

23. The basic position is as stated by Lord Bingham in *Johnson v Gore Wood & Co*[21]: "(1) where a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company. A claim will not lie by a shareholder to make good a loss which would be made good if the company's assets were replenished through action against the party responsible for the loss, even if the company, acting through its constitutional organs, has declined or failed to make good that loss… (2) Where a company suffers loss but has no cause of action to sue to recover that loss, the shareholder in the company may sue in respect of it (if the shareholder has a cause of action to do so), even though the loss is a diminution in the value of the shareholding… (3) Where a company suffers loss caused by a breach of duty to it, and a shareholder suffers a loss separate and distinct from that suffered by the company caused by breach of a duty independently owed to the shareholder, each may sue to recover the loss caused to it by breach of the duty owed to it but neither may recover loss caused to the other by breach of the duty owed to that other.'

24. The basic position yields to an exception however where the wrong done to the company has made it impossible for it to pursue its own remedy: See *Giles v Rhind*[22] (a case in which the company, which was in administrative receivership, brought proceedings against the wrongdoing director, who demanded and obtained an order for security for costs which successfully stifled the proceedings; when the company discontinued the action a shareholder brought proceedings on its own behalf to recover its own loss. It was conceded that this was reflective loss but this court

[17] [1983) NZLR 22
[18] [1996] PLNR 205
[19] [2006] 2 NZLR 455
[20] [2009] EWCA Civ 830
[21] [2000] UKHL 65, [2002] 2 AC 1
[22] [2003] Ch 618

allowed the claim to proceed.) *Giles* has been the subject of judicial criticism, most notably from Lord Millet in the Hong Kong case of *Waddington v Chan Chun Hoo*[23], but in *Webster* Lord Clarke MR confirmed that it is still authoritative notwithstanding its criticism and any departure from the exception therein expressed would require the precedent to be overruled by the Supreme Court (at paragraphs 36 and 37).

25. Further, firms ostensibly acting for a company have been held to assume responsibility to individual shareholders/ directors where they suffer losses separate to the losses suffered by the company. In *Howard & Witchell v Woodman Matthews & Co*[24] the Claimant owned 2,075 of the 2,500 shares in a limited company, his wife owning the remainder. The solicitor, engaged to act for the company, failed to inform the Claimant of the time limits under the Landlord and Tenant Act 1954. As a result the Company, being the tenant, obtained a new tenancy of garage premises on negotiated terms which the Claimant alleged were less favourable than they would have been had the court granted a lease on terms provided by the 1954 Act. Specifically the negotiated lease contained a clause providing that the Claimant could not sell his shares in the company without the prior consent of the landlord, which the Claimant contended diminished the value of his shares. Staughton J held that the solicitor owed a duty both to the company and to the Claimant because, on the facts, the solicitor knew that the Claimant was the company apart from matters such as tax and the claims of creditors. The solicitor was therefore in breach of duty to both in not reminding the Claimant of the need to bring an application in the county court within the relevant time limits. The rule that a shareholder had no cause of action merely because a company in which he held shares has suffered damage did not apply to the present case, because there the loss is suffered by the company. Here, by contrast, the Claimant had sought to recover his own loss which had not also been suffered by the company, which arose out of the insertion of a new clause in the lease.

(ii) Trustee Losses

26. A beneficiary under a trust does not have a direct cause of action in negligence against a person who may be liable to the trustees: *Parker-Tweedale v Dunbar Bank plc (No 1)* [25]but exceptionally if the trustees fail to pursue such a claim, it may be open to a beneficiary to assert the claim in proceedings to which the trustees are also parties as Defendants: *Hayim v Citibank*.[26] For a recent example of a beneficiary of an estate suing, in his personal capacity, the solicitors who had negligently advised the personal representatives of the estate (and then, accepting that a claim that the solicitors owed a personal duty of care to the beneficiaries would be difficult to sustain, applying to amend the pleadings to continue the claim in the name of the estate as a derivative action after expiry of the limitation period) see *Roberts v Gill & Co and another*[27]. The application was refused in part because the administrator would have to be joined to the proceedings (as Defendants) if a derivative claim was to be pursued but the criteria in CPR Part 19 for joinder out of time had not been met since joinder was only permitted where necessary for the original action and it was not necessary to join the administrator for the beneficiary to pursue his personal claim.

ISSUE 2: IDENTIFYING THE PROPER DEFENDANT:

27. Identifying the target Defendant is equally as important as establishing the identity of the 'client' of a firm or at least the person to whom a duty of care is likely to be held to be owed. In a number of recent cases the courts have grappled with the issue of 'personal liability' of a solicitor and (yet further) with the scope of a 'firm's liability' for partners acts and omissions.

    27.1 In *Yazhou Travel Investment Co Limited v Bateson Starr (a firm)*[28] the Claimant agreed to buy from Key Choice Limited upper floors in an office block in Hong Kong along with a right (sic) to name the building. The naming right cost HK $48m alone. The solicitors acted for both sides in the transaction, two individuals being consultants to the firm 'looked after' the Claimant. The naming right inter alia was found to be deficient in that it did not

[23] [2009] 2 BCLC 82
[24] [1983] BCLC 117
[25] [1991] Ch 12
[26] [1987] AC 730
[27] [2010] UKSC 22
[28] [2005] PNLR 31.

bind co-owners of the building. The Claimant sued the firm and the two consultants personally, alleging they owed personal duties of care. The scope for personal liability was resisted, the second and third Defendants relying on Williams v Natural Life Health Foods Limited[29] the argument failed, the court holding that the consultants had assumed a personal liability. Given the reasoning it is difficult to conclude that the same result would not flow where the service is provided by a limited liability partnership.

27.2 In *Sangster v Biddulph*[30] the Defendants were each solicitors, the first being a sole practitioner before entering into an arrangement with the second Defendant designed to enable the first Defendant to undertake work for a mortgage supplier. The agreement provided for the second Defendant's name to be on the letterhead and for the second Defendant to receive 30% of the fees generated by the mortgage supplier. The second Defendant took no part in the running of the firm and remained at all times a partner in another firm. The Claimant alleged she had been the victim of a scam by a mortgage broker who persuaded her to borrow money secured on her home on disadvantageous terms and then to lend the money to him. The broker arranged for the firm to act both for himself and the Claimant in the transaction. Sued by the Claimant, the first Defendant admitted negligence but had no assets nor professional indemnity cover (he having acted dishonestly). The issue arose therefore whether the second Defendant was liable to the Claimant as a partner in the firm at the relevant time. This matter was determined as a preliminary issue and determined adversely to the second Defendant. The result of section 14(1) of the Partnership Act 1890 was that he had held out the first Defendant as a partner; the court then found (generously?) as a fact that the Claimant had relied on the "holding out" although there was no evidence she had ever had any direct contact with the 'firm' at all.

27.3 *Hodson v Hodson*[31] where a solicitor (Julienne D Rowlands) had entered into a partnership of convenience on the sale of her practice with the purchaser of her firm to provide short-term supervision satisfying a Law Society requirement. This was sufficient to constitute her a liable partner in relation to a claim against the new business and vulnerable to enforcement action in respect of the balance of an unsatisfied judgment of the order of £245,000.

28. To attract liability to a Claimant the acts or omissions of the partner concerned and which are alleged to constitute negligence must be ones for which firm is liable – in other words they must be able to be characterised as part of the legal services the firm would provide in the normal course of business. In *Nayyar v Denton Wild Sapte*[32] an Indian qualified solicitor employed by the Defendants introduced a client to an opportunity to become the UK general sales agent for Air India. This required payment of £383,000 to a company in the British Virgin Islands. The payment was a bribe and did not lead to the appointment of the client to the desired distributorship. A claim against Denton Wild Sapte based on the alleged negligence of its Indian qualified solicitor failed – partly because the payment was a bribe and irrecoverable against the firm for that reason but also because the solicitor concerned had been providing an independent business brokerage service and not legal services on behalf of the firm.

ISSUE 3: THE COMPETENCE COMFORT ZONE:

29. Nowadays it is very common for individual solicitors within (even) a full service firm to focus in practice on a particular area of law. This can raise difficulties as client issues will often straddle the boundaries of what may be perceived as discreet practice areas. A common example is property or mergers and acquisitions - either of which can involve tax considerations. It may be that several departments become involved to advise upon the different aspects of a transaction. In this case, it is crucially important to have "joined up thinking", so that all the efforts of individuals form a cohesive whole and nothing is missed.

[29] [1998] 1 WLR 830, HL.
[30] [2005] PNLR 33.
[31] [2010] PNLR 108
[32] [2010] PNLR 280

In other cases, a single file handler takes responsibility for the file. But caution should be exercised not to hold oneself out as capable to act upon a matter unless fit and qualified to do so.

The judgment of Mr Justice Lightman in *Hurlingham Estates Ltd v Wilde & Partners*[33] is a cautionary tale in that regard. The Defendant solicitors acted for a client in the purchase for £200,000 of a shop lease where a limited company carried on business and the sub lease of the premises for £200,000 back to that company. The structure of this transaction (which had been agreed by the client and the company and not suggested by the solicitor) was such that it exposed the client to a tax liability of nearly £70,000, where if a different structure had been adopted exposure too this liability would have been avoided. The client sought to recover this sum as damages. The solicitor, the conveyancing and commercial partner, sought to argue that at the meeting where he agreed to act for the client in drafting the documents necessary to carry out the transaction, it was further agreed that he would not be responsible for advising on the financial or taxation consequences or implications since he had no knowledge of these areas. The client disputed this, saying no reference had been made to tax at all. The issues for decision were therefore (1) whether the solicitors, when they accepted instructions, obtained the client's agreement that their remit should be limited by excluding any duty to advise on tax and that the clients should look for tax advise elsewhere, and (2) whether in the absence of such express limitation on the duties they assumed, there was a duty on the part of the solicitors to advise of warn the client of its exposure to the tax liability.

31. The Court found as a matter of fact that there was no agreement limiting the duty of the solicitor (since there could be no sensible reason why the client would have agreed to dispense with advice essential for a sensible commercial decision). The solicitor in fact assumed the full responsibilities to be expected of a solicitor having conduct of the transaction. Mr Justice Lightman commented further, although obiter:

> "*I should add that even if (contrary to my holding) the clients had at the meeting entered into some such agreement as suggested by [the solicitor] that he be retained subject to a limitation on his remit, I doubt if he could have established that there was any fully informed consent on the part of the clients. Conspicuously he failed to tell them that the lacuna in his legal knowledge was not one to be expected of a solicitor having the conduct of a transaction such as that now to be undertaken by him on their behalf and that the client's interests might (indeed did) require them to instruct another solicitor who was competent and would not need to insist on such a limitation on his services and duties*."

32. Since there was no reason or justification for the solicitor to assume that the client would be seeking taxation advice on the transaction elsewhere ie from its accountants, auditors or anyone else, or that the client was himself possessed of any expertise in matters of taxation, the solicitor should have appreciated that the client needed his advice and services to avoid any unnecessary tax risk. In fact, the judge went so far as to say he had found comfort for this finding in the fact that the solicitor had given evidence to the effect that he (the solicitor) had felt the need to make the disclaimer to his client that he had no knowledge or experience in tax matters (although the judge had found as a fact that no such disclaimer was made) because he felt otherwise the client might have been led to believe he was going to provide the necessary tax advice.

33. One might imagine that the proper thing to do where instructions touch upon issues outside the scope of a file handler's experience would be to seek advice from a third party. But this also can be a trap for the unwary: even when advice is sought from counsel, the firm is under a duty to prepare adequate instructions and proactively review the advice given rather than simply relay it to the client. If counsel's advice fell below the standard to be expected of a reasonably competent barrister and the firm failed to equip themselves with the necessary knowledge to advise properly themselves, these acts of negligence are separate and independent and damages can be recovered from both counsel and the firm: see *Estill v Cowling Swift & Kitchen*[34], another case involving tax efficiency, this time in settling a trust. Here the executors of E's estate and trustees of a discretionary settlement made by E obtained damages for the loss

[33] [1997] 1 Lloyd's Rep 525
[34] [2000] Lloyd's Rep. P.N. 378

resulting from E's legal representative's failure to advise E to utilise a different trust structure which would not attract a tax liability.

CONCLUSION

34. In this paper we have sought to highlight some of the lesser contemplated risk areas for legal advisors which are "around the margins", both of the retainer and of the field of competence.

35. It is important not only to identify potential risk areas but to take them on board and to take positive practical steps to mitigate them. To that end, enclosed is a checklist highlighting some of the risk areas from the acceptance of instructions to the closure of a file, together with some suggestions on how to combat them. This is not an exhaustive list, but it is hoped that it might be a useful starting point.

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