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Welcome

In this issue, (for the majority of you the last one before the end of this policy year) we have identified and set out what we consider to be the top ten common causes of claims against solicitors. These are drawn, in part, from our own experience, but also from a talk given by one of our panel law firms Clyde & Co LLP at the seminars we held for our insureds in London and Manchester earlier this year.

Once again, we express our thanks to Arline Lester, solicitor in our claims team, for her invaluable contribution to this issue.

We hope you find the content enlightening and we have attempted to put it in a format which lends it to be circulated amongst your staff to read and digest; in particular the practice points we have suggested at the end of each section.

Michael Blüthner Speight

Top ten common causes of claims against solicitors and how (hopefully!) to avoid them

1. Failure to record instructions and advice given

Across all types of claims, a very common allegation is one where clients or, more commonly, former clients, say that they were never given proper advice. They will say that, had they been properly advised, they would have acted differently and would not have suffered any loss. Alternatively, for example in a transactional matter, clients will say that the executed document does not record the terms that they agreed; that there is an onerous term in the executed agreement and, as a result, they have, or will, suffer a loss.

In many cases, we are told by the solicitor against whom the allegation is made, "but I did give the advice" or "my client told me to include that term in the agreement". Unfortunately, however, the file does not record it.

Whilst the courts have held that clear oral advice can, depending on the circumstances, be sufficient, if there is no note of it, or it is not recorded in writing, it is very difficult to prove. As a general rule the courts will prefer the evidence of the lay client. Judges will say that the transaction or matter was a "one off" for the client who will, as a consequence, have a much better recollection of it than the busy solicitor, for whom the matter was only one of many he or she was handling at the time.

Evidential difficulties are particularly acute where claims are brought just within the limitation period and almost six years have passed since the transaction or matter took place. This can be even longer if the client can rely on S14A of the Limitation Act 1980 (which allows a claim to be brought in three years from date of knowledge even if primary limitation has already expired, subject to an overall longstop of 15 years) which can be common in property transactions where, routinely, title defects do not come to light until the property is sold many years later. By the time the claim is made, the solicitor who acted on the matter can do little more than say what he or she believed would have been advised. There are also instances of where the solicitor who dealt with the transaction left the firm years ago and either cannot be traced or is unwilling to assist.

The importance of recording advice and instructions cannot be overemphasised.

Practice Points

- Keep full clear attendance notes of advice sought and given.
- In transactional matters, don't just rely on successive drafts as a record of what the client wanted.

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2. Failing to distinguish role from that of other professionals

In many matters, it is common for other professionals to be involved in the same transaction as the instructed solicitor, e.g. accountants in corporate transactions; surveyors in property transactions; professional advisers in trust and pension matters and barristers in litigation.

Tax advice is one of the key areas where we often see mistakes arising because solicitors and accountants involved in a matter assume that the other is advising on the tax aspects of the transaction. Similarly in pension matters, individuals and companies can be advised by lawyers, pensions consultants and actuaries. It is very easy for each professional to think that the other is responsible for a particular area, such as implementing changes to pension deeds and scheme rules.

It is vitally important that each professional understands what the other is doing so that the responsibility for advice for a particular area does not fall between the gaps. The courts tend to find that, in complex transactions involving more than one professional adviser, solicitors play the lead role and, as such, are more likely to be found in breach of duty than the other professionals. It is also widely accepted that judges, being lawyers themselves, impose a higher standard of care on lawyers than for other professionals where they will usually rely on expert evidence.

Where barristers are concerned, whilst solicitors are entitled to rely on specialist counsel when properly instructed, they must still exercise independent judgement and reject counsel's advice if it is thought to be glaringly wrong. The more specialised the advice, the more reasonable it will be for a solicitor to accept it but, "reliance on counsel" will only ever be a complete defence where the area of law concerned is considered to be both specialised and outside the knowledge and expertise of the instructing solicitor, and reasonably so.

Practice Points

- Clearly define at the very outset of the retainer your role in the transaction or matter.
- Set out in writing the areas on which advice will not be provided and communicate this to your client and to any other professional advisers involved.
- Apply your own judgement to advices / opinions from counsel. Even in the most specialised of areas, if, applying your own knowledge and experience, there is something that appears to be glaringly wrong, challenge the advice given or do not accept it.
- Consider the use of proportionate liability clauses in your retainer with your client.

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3. Missing Time Limits

Computerised systems in legal offices have cut down substantially on the number of claims arising from the late issue of proceedings that bedevilled the profession in previous years.

It would be a mistake, however, to think that these have disappeared entirely. Recent examples include:

- Missing a date for the exercise of a break option in a lease. This can, and usually does, have drastic consequences, as the client remains tied in to the lease for several more years, leading to high-value claims based on continuing obligations over the remaining period of the lease.
- Missing dates for filing of court documents. Lord Dyson in **Denton v White** improved on **Mitchell**, but missing deadlines for costs budgets; witness statements; expert reports etc. (all matters consistently notified to us) still result in adverse costs consequences or allegations of lost chances in the litigation.
- Missing time limits for registration of legal charges. Another charge taking priority can and often does result in large losses and a resulting claim.

There are a number of reasons why deadlines are missed, even in these days of computerisation. We will all have experienced technology failures in the past and it is also relatively easy to enter a deadline into a calendar system on the wrong day. How many times have you written the wrong year when making out a cheque in January?

Problems can arise where a fee earner is away from the office, or a new fee earner takes over a file. The most obvious cause of missed time limits, however, is where the solicitor fails to notice the date, or simply gets it wrong in the first place.

Practice Points

- Double check all time limits.
- Enforce appropriate diary systems for recording deadlines on a file.
- Consider keeping a double diary system – duplicate entries in the fee earner's diary and also the central team calendar.
- If you keep paper files, record deadlines at the front of the file so you are constantly reminded of them whenever you open the file.

4. Failure to record the scope of the retainer

It surprises and disappoints us that we continue to be notified of claims where there is no letter of retainer on the file.

If an engagement letter setting out the work that the solicitor has been asked to do is not provided, then the scope of the solicitor's duties in contract and tort are likely to be unclear (and potentially unlimited). At the very least, it gives the client scope to argue ambiguity. It also means that the opportunity of seeking to limit liability is lost.

There is ample case law on duties that are owed to a client with regard to the extent of advice to be given. For example, if a client is inexperienced, the solicitor may be required to give more detailed advice (**Carradine v DJ Freeman**); a solicitor will be under a duty to inform the client about a problem or risk which he notices or ought to notice in the course of carrying out his instructions (**Credit Lyonnais SA v Russell Jones v Walker**); a solicitor is under a duty to point out and explain terms or provisions that the client cannot be expected to understand (**Pickersgill v Riley**).

Although the solicitor does not owe an implied duty to give commercial advice, problems can arise where there is some ambiguity as to the advice which the claimant says should have been given. In **Stone Heritage Developments Ltd. v Davis Blank Furniss**, the defendant firm of solicitors was held not to have been negligent because it was clear from the correspondence and documents exactly what the firm was instructed to do.

Practice Points

- It is absolutely vital to send out a retainer letter for every instruction. This is, in any event, an SRA Code of Conduct requirement.
- Your retainer letter should clearly set out what work you will be carrying out. It should also make clear anything that you will **not** be advising on.
- Be aware of "mission creep". If, during the course of the matter, the scope of the retainer increases or changes, a new retainer letter should be sent out, clearly identifying any changes from the initial letter, and including within it all key terms, including any limitation of liability clauses, that were in the original retainer letter.

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5. Lack of Supervision

In most legal practices it is normal for cases, or tasks on certain cases, to be delegated to more junior fee earners, some of whom may be non-legally qualified.

Indeed, solicitors are encouraged, not least by costs judges, that work should be carried out at the right level and as economically as possible for the client.

Whilst it is arguable that the standard of care of a junior or non-qualified member of staff may not be the same as that expected of an experienced solicitor, errors by those individuals will, nevertheless, amount to breach of duty if there is inadequate supervision of those more junior staff.

Lack of supervision gave rise to many of the lender claims that arose post 2008 and it continues to be an issue for firms and insurers. In our experience, claims arise in instances where there is clearly supervision in place (such as a partner working in tandem with a fee earner on a particular matter) but where the supervision is inadequate. We have seen instances of partners copied in to e-mails sent by junior fee earners to clients where the advice given has been plainly wrong. Nevertheless, the wrong advice has not been picked up by the partner. There are also examples of uncorrected bad drafting; lack of attendance notes; failure to notice excessive delay (which should have been picked by management information systems as no work will have been recorded on a file for long periods) and poor file management generally. These failings often start as a complaint but can, and often do, lead to claims, especially where they have turned into fees disputes.

Practice Points

- The SRA Code of Conduct (Outcome 7.8) requires firms to have a system in place for supervising client matters. Review and update your precedents and systems regularly and check to make sure that they are actually working.
- Carry out systematic file reviews.
- Make appropriate arrangements to cover holidays and absences, and also those working their notice periods.

6. Advising outside your area of expertise

The standard of care expected of a solicitor is the standard of a reasonably competent solicitor with experience in his or her particular field.

In **Hicks v Russell Jones & Walker** Henderson J said:

> "Russell Jones & Walker should not be judged by the standard of a "particularly meticulous and conscientious practitioner". Nor are they liable for what may in the result turn out to have been errors of judgement, "unless the error was such as no reasonably well-informed and competent member of that profession could have made"… However, the standard to be applied is in my judgment that of a reasonably competent solicitor with experience in the fields of commercial litigation and insolvency and it would be absurd to judge them by the same standard as a small country firm…Russell Jones & Walker held themselves out as possessing the necessary specialist expertise in those areas to deal competently with all the technical and procedural issues raised by the appeal…"

If, therefore, you or your firm hold yourself out as having specialist expertise, then that is the standard by which you will be judged. It will not matter that the individual dealing with the case may not actually be a specialist in that area.

Claims that tend to arise from lack of expertise are those in more difficult areas such as tax, leasehold enfranchisement, defamation, foreign jurisdiction etc. but every area of can have its own particular complexities.

Practice Points

- Do not accept instructions in areas where the firm does not have the expertise or ability to resource it adequately.
- In areas where you do have expertise, e.g. conveyancing, be careful not to stray into advising on related matters where you do not, for example tax.
- It is crucial that partners are not tempted to hoard work to meet targets or keep to themselves a client relationship. With the right culture and reward system partners will pass on work to others within the firm who do have the requisite expertise and resources to the benefit of the firm as a whole.

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7. Conflicts of Interest

Solicitors owe a duty of confidentiality to a client and also a duty not to act where there is a conflict of interest, i.e. where the interests of different clients conflict or where there is a conflict between the interests of the solicitor and those of the client.

The consequences of any breach can be serious. There can be claims for breach of fiduciary duty; disciplinary action by the SRA; client loss and reputational damage to a firm.

Conflicts of interest can sometimes be difficult to identify. Most obviously they can arise where the solicitor acts for an entity (e.g. a company or partnership) and does not consider whether all clients continue to have the same interest. Commonly this will occur when advising directors or partners on a company or firm matter. An issue can arise, during company restructuring for example, where the interests of one or more of the directors may differ from the interests of the company as a whole.

Conflicts can also arise where solicitors act for two clients who start out with a common interest but their interests then diverge. In straightforward conveyancing transactions, on the face of it buyers and lenders have the same, common interest. This is to obtain good title to the property. Conflicts can arise, however, where an issue that should be reported to the lender is one that will adversely affect the buyer.

Practice Points

- Carry out conflict searches at the start of every new instruction. It is a requirement of Chapter 3 of the SRA Code of Conduct that you have an appropriate system in place to identify and deal with any issues regarding potential conflicts of interest.
- Consider whether it would be appropriate for your firm to have a procedure for escalating difficult conflict issues to certain members of the firm, or a group of such members, for an independent decision.
- If your firm undertakes multi-jurisdictional work, consider whether this throws up any issues where there may be different rules regarding conflicts of interest.
- New and junior members of the firm should be properly trained so that they can identify conflicts of interest, not only at the beginning of, but throughout, the retainer.

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8. Third Parties

It can come as an unpleasant surprise to a solicitor to receive a claim from a party who was not a client. The reaction that we encounter most often is, "I can't possibly be liable to X, he was never a client". Regrettably, this is not necessarily the case.

A court will consider whether the solicitor, expressly or impliedly, assumed responsibility to a third party for his or her actions. The tests that the court will apply are what is known as the "threefold test" (foreseeability, proximity and reasonableness) and also the "incremental test" (imposing a duty where the facts are analogous to decided cases).

The principal issue to be decided is whether the solicitor assumed responsibility to the third party; whether it was reasonable for the third party to rely on the solicitor; and whether, expressly or by conduct, the solicitor led the third party to believe that he or she could do so.

The cases where this issue is most likely to arise are those where the solicitor and the third party engage in direct communications. Direct communication is not necessary, however, to find that a duty of care exists.

In **Dean v Allin & Witts**, where the defendants believed that they were acting only for borrowers obtaining an advance from an individual unsophisticated lender "D", the court held that:

> "…the law could and should impose a like duty of care on A & W towards D for the provision of an effective security, the benefit of which, to A & W's knowledge, the borrowers wished to confer on D and which was fundamental to the loan transactions…"

Practice Points

- Be aware of the risks of inadvertently assuming duties to third parties.
- Ensure that your retainer letter contains an appropriate disclaimer that the advice may not be shown to, or relied on by, third parties.
- Consider whether this disclaimer should also be included in any particular piece of advice provided to your client (e.g. a due diligence report).
- Resist any demands that your advice may be shown to/relied on by third parties (e.g. lenders).

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9. Identifying the client

A transaction can be invalid where a party does not have authority to enter into it.

If a solicitor does not properly identify the individual or individuals for whom he or she is acting, then the duties to those individuals can be breached.

Examples where this can occur are:

- Where the solicitor is acting for a company or shareholders for a company but fails to identify whether the director with whom the solicitor is dealing has authority to give instructions, execute documents, receive advice etc. on behalf of the company.
- Where the solicitor is acting on the sale of a co-owned property but has failed to identify that the (one) person giving the instructions has the authority of all of the co-owners.
- Where the solicitor is acting for more than one borrower but has failed to identify that the individual giving instructions has the authority of all of the borrowers.
- Where the solicitor is acting for trustees but has failed to identify that the individual giving the instructions has the authority of all of the trustees.

There are also other instances where you can face difficulty from failure to identify the client. This can arise, for example, when you are consulted by a director of a company and it is not clear whether you are acting for the director or for the company.

Practice Points

- Where you are acting for a company, confirm at the very outset (by reference to the Memorandum and Articles of Association if necessary) that the individual you are dealing with has the requisite authority on behalf of the company.
- Write to all co-owners; co-trustees etc. and seek confirmation from them that the person consulting you has the authority to act on behalf of all of them.
- Set out the identity of the client in the retainer letter and make it clear that you are acting e.g. for the company and not for any individual director.
- Carry out identity checks carefully and be alert to the possibility of identity fraud if there are any unusual factors in the transaction.

And, last but not least:

10. Time Pressures

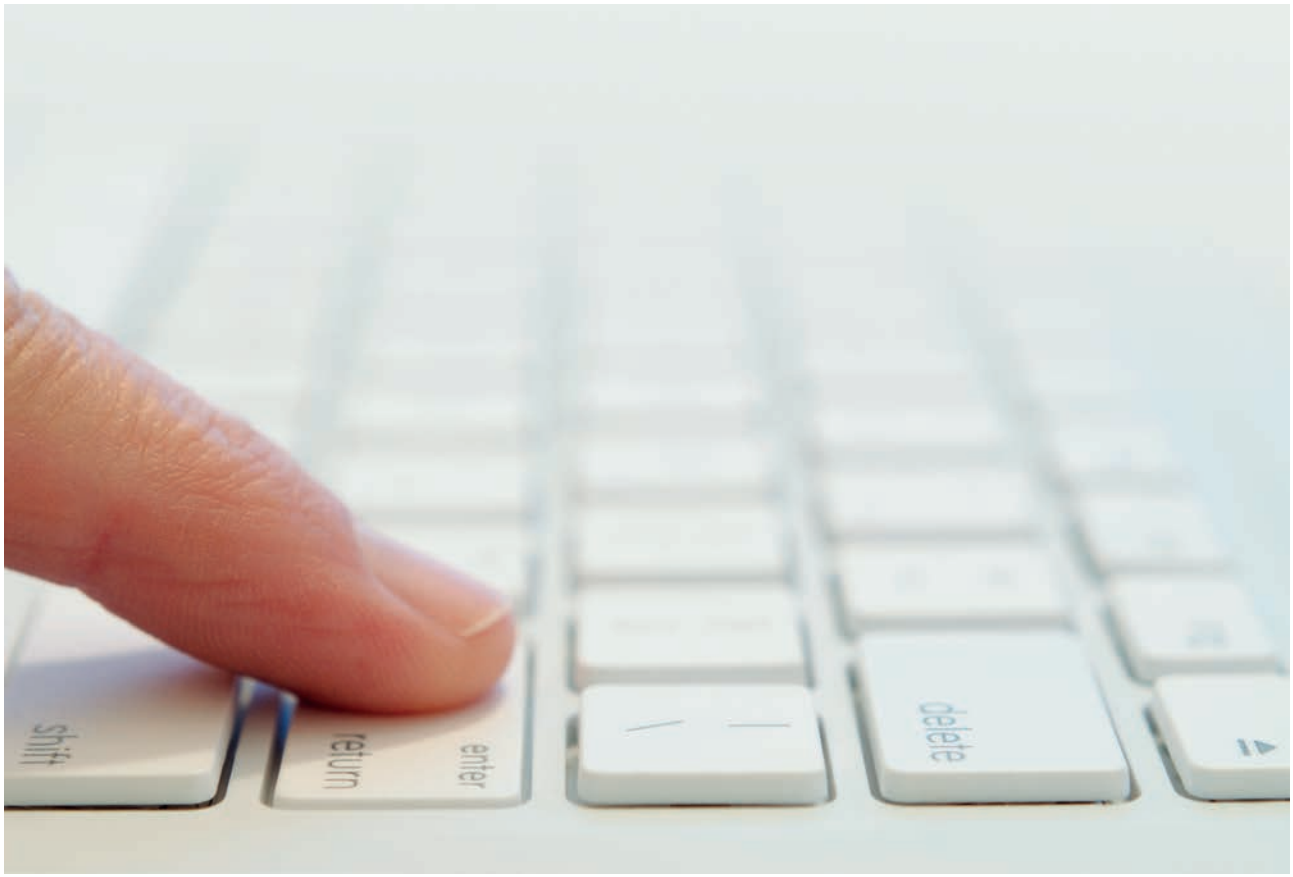
There are limited instances where a court will take into account time pressures when determining whether a solicitor has fallen below the requisite standard of care. Door of the court settlements are an obvious example.

In most cases, however, a court will have little sympathy for a solicitor who seeks to excuse any shortcomings by pleading time pressures. The fact that client expectations of speedy responses, especially to e-mails, is a reality of modern day practice, will not exonerate a solicitor who makes a significant error in any e-mailed response. Equally, the fact that commercial entities expect deals to be done quickly, and have little patience for what they often see as "lawyers getting in the way" will not excuse errors or ambiguities in the completion documents.

As we all know, the Court of Appeal adopted a "zero tolerance" approach in **Mitchell v News Group Newspapers**. Work pressures that resulted in deadlines being missed was held not to be acceptable. It would be a mistake to think that the softening of the courts' approach in **Denton v White** will lead to a more sympathetic hearing from a judge in the case of a missed time limit due to workload and time pressures. We consider that it is highly unlikely that solicitors will ever get the sympathy of the court, let alone that of their clients, if mistakes are made for this reason.

Practice Points

- Manage workloads within the firm by holding regular team meetings and one-to-ones with staff.
- Invest in time management training for all fee earners.
- Manage clients' expectations in relation to timescales as well as outcomes.
- Don't overpromise (and, as a consequence, under deliver).



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- Allegations of wrongful acts.
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