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# Junior Practitioner Group Briefing

In this edition of 1 Chancery Lane's Junior Practitioner Group Briefing Katie Ayres and Max Wilson look at Solicitors' Negligence.

## To Warn or Not to Warn, That is the Question?

***"We are all honorable men here, we do not have to give each other assurances as if we were lawyers". Mario Puzo, The Godfather.***

Some of my favourite judgments are those in which Judges, cognisant of the often technical and sometimes tedious rationale behind a decision, lighten their judgments with literary references.

Recently, one such particularly satisfying reference (involving a favourite novel of mine) appeared in a judgment on statutory interpretation. In the judgment of *AIG Europe Ltd v OC320301 LLP [2016] EWCA Civ 367* Longmore LJ, opted to lighten a particularly technical judgment by referring to Jane Austen's description in Emma of the mortified Mr Elton leaving Highbury "*after a series of what had appeared to him strong encouragement*" to explain that the word "*series*" usually implies a connection between the events or concepts which constitute the series. In a similar vein, Humpty Dumpty's scornful rebuke to Alice in Through the Looking Glass, "*[a word] means just what I choose it to mean — neither more nor less*" is a favourite in cases involving the interpretation of contracts. Of course, 400 years on from his death William Shakespeare still appears fairly regularly.

*Barker v Baxendale Walker Solicitors & Baxendale-Walker [2016] EWHC 664 (Ch)* addresses whether a solicitor advising on statutory interpretation will be negligent for failing to warn that his opinion could be wrong. The judgment, unfortunately, does not suggest that solicitors should delve into the world of literature for inspiration but does give some good guidance on the issue of warnings in relation to the provision of advice.

Mr Barker (the claimant) established a successful company in the 1990's and in planning for an exit wished to avoid what would have been a considerable amount of capital gains tax. Mr Barker decided to retain Baxendale-Walker Solicitors (the defendant) who advised that an employees benefits trusts ("EBT") was the most appropriate structure for his needs. The key advice, later alleged to be negligent, was that Mr Barker's family would be able to benefit from the EBT after his death.

The EBT was put into place by the Defendant and subsequently examined over many years by various tax experts, for different reasons, with numerous criticisms being levelled at it. Eventually HMRC argued that the drafting of the Trustee Deed which enabled Mr Barker's family to benefit from the EBT after his death was a breach of section 28 of the Inheritance Tax Act 1984 ("IHTA"). As a consequence, Mr Barker faced a tax liability in the region of £25million.

Mr Barker received advice at that point which concluded that HMRC's arguments had force and that compromising the tax liability at £11million was a good outcome upon consideration of the risks involved.

Mr Justice Roth's view was that the EBT documentation did in fact work and the section 28 IHTA issue was to be read as

the defendant had interpreted. However, in relation to the issue of the lack of a warning it was evident from the differing opinions of the numerous tax experts that Mr Barker had retained, as well as HMRCs assessment, that there was indeed considerable doubt regarding the interpretation of section 28 IHTA. This being so, Baxendale-Walker should have provided an adequate warning highlighting this uncertainty, the implication being that absent any such warning, there was no doubt the EBT would work as advised. The judge also noted that the need to warn is more significant where the lawyer is advising a client before he embarks on a course of action and the lawyer is already on notice about a possible point of challenge to her proposed interpretation. Even so, the claimant's case fell down on causation in any event as the Judge found that even if he had been given an appropriate warning the claimant would nonetheless have gone on to request the EBT.

Baxendale-Walker might be criticised for being arrogant for their conviction in the correctness of their interpretation of the relevant statutes. At one point, when shown a contradicting advice by a different firm of solicitors, the senior partner theatrically threw the advice over his shoulder and likened the other solicitors to general surgeons compared with brain surgeons. Saying that, their interpretation was indeed vindicated at trial so perhaps what may have been interpreted as arrogance, had the decision on interpretation gone against them, was perhaps more fairly genuine confidence and pride in their abilities as experts. Jane Austen has a salutary warning herself on this matter:

"*Vanity and pride are different things, though the words are often used synonymously. A person may be proud without being vain. Pride relates more to our opinion of ourselves, vanity to what we would have others think of us.*" (Jane Austen, Pride and Prejudice)

When advising a client as to the interpretation of a statute (and I expect similarly, a contract) the advisor should keep well in mind any plausible alternative interpretation as a solicitor who comes to a non-negligently incorrect view might still be negligent for failing to give a warning. It is clearly acceptable to have confidence in the interpretation proposed and indeed "*it [is] difficult to see that solicitors whose interpretation is likely to be correct are nonetheless in breach of duty for failing to warn the client that they might be wrong*" (judgment paragraph [178]).

Whether or not a warning will be necessary is a matter of fact and degree depending on the uncertainty (or otherwise) of the interpretation provided and the scope for, and knowledge of plausible alternatives. Accordingly, there may not be a need to issue a warning if such alternatives arise only after "*groping knee-deep in technicalities*" (Charles Dickens, Bleak House).

Solicitors should also bear in mind that showing regard for plausible alternatives is good evidence for establishing whether the actual advice as to interpretation (as opposed to the warning) was negligently provided. Such an approach will ensure that, even in the event an opinion is found to be supportable albeit incorrect, confidence will not be lost in the advisor and "*good opinion once lost, is [not] lost forever*" (Jane Austen, Pride and Prejudice).

Katie Ayres

## Circumventing liability in fraudulent property transactions: what is required by way of due diligence?

Despite the lack of buoyancy in the housing market, fraudulent property transactions remain prevalent; the National Fraud Authority estimates that mortgage fraud losses alone are in the region of £1 bn per year. One example is where the fraudster poses as the registered proprietor of a property with the use of false identity information. The fraudster then reaps the proceeds of sale and disappears before the new buyers are registered as proprietors.

In this situation the purchaser has recourse to a damages claim against their solicitors, *inter alia,* for breach of trust. This is because the trust obligation in relation to the purchase money is absolute; namely, not to release money before completion (*Lloyds TSB plc v Markandan & Uddin* [2012] EWCA Civ 65). However, pursuant to Section 61 of

the Trustee Act 1925 ("TA"), it remains open to the solicitors to claim relief from liability if they can demonstrate that they acted both honestly and reasonably.

In light of the recent case of *Purrusing v A'Court & Co* [2016] EWHC 789 (Ch) it is now apparent that a claim can also be successfully brought against the *vendor's* solicitors. This is so in spite of the well-established principle that a vendor's solicitors do not owe a duty of care to the purchaser (*Gran Geltao Ltd v. Richcliff (Group) Ltd* [1992] Ch. 560).

The facts of *Purrusing* will no doubt be familiar to those in the conveyancing field. The basis of the claim against the vendor's solicitors was for breach of trust in respect of a fraudulent property transaction. The Court had to consider the novel issue of whether the vendor's solicitors should be treated more leniently under Section 61 TA. The Court held that they were to be treated no differently, *(para 41);* both firms were found to be equally liable.

In coming to this conclusion HHJ Pelling QC (sitting as a Judge of the High Court) made various findings of what amounted to poor due diligence. When read together with the Conveyancing Handbook, the judgment provides a useful insight into what is required of solicitors at the pre-completion. In summary, solicitors should be alive to the following:

(a) The importance of complying with the Money Laundering Regulations 2007 when enhanced due diligence is required due to the nature of the transaction (*paras 28-33*). In particular, Regulation 5 c) which provides that consideration should be made as to "*whether the client is actually the owner of the property they want to sell*". Further, Regulation 5(a), "*identifying the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source*". It was held to be irrelevant that money laundering was not the vice from which the transaction suffered, instead it is sufficient if the lack of compliance increased the risk of loss by fraud.

(b) The importance of complying with the guidelines set out in the Conveyancing Handbook including the 'Warning Cards'.

(c) For the seller's solicitors; being observant of any unusual circumstances and/or behaviour of the client. In *Purrusing* this included the following:

i. The client refused to provide his employment history to an initial purchaser and, based on this request, sought to find a different purchaser.

ii. He pressed on for on an expedited completion.

iii. The property was unoccupied and unencumbered.

iv. The Office Copy Entries for the properties contained an alternative address for service in Cambridge.

v. No documentation had been provided linking the seller to the property in question, (*para 19*).

(d) For the purchaser's solicitors:

i. Communication with the client about the risks. The purchaser's solicitors had made additional enquiries into the identity of the seller. Although the answers provided were inadequate, the firm did not inform their client that they had made such enquiries nor that the answers they received were unsatisfactory, (*paras 23-27*).

ii. Ensuring that validation of documentation is received. Here, it was apparent that the seller's solicitors could not verify the information available to them and no link was established between the seller and the property.

iii. Ensuring strict confidence in correspondence between solicitors. The purchaser's solicitors blind copied confidential documents relating to the transfer without their client's consent which subsequently fell in the hands of the fraudster, (*para 22*).

It is added that arguments on causation are unlikely to be

material to any defence. In *Nationwide Building Society v Davisons Solicitors* [2012] EWCA Civ 1626 the solicitors were not granted relief despite a finding that the fraud was likely to have succeeded even if the solicitor had acted reasonably.

In summary, conveyancing solicitors must take a risk-based approach to due diligence. They must not take anything said by their client for granted and instead must be alive to the warning signs discussed above. Further, they must take heed of both the money laundering regulations and the 'Warning Cards' in the Conveyancing Handbook when making enquiries at the pre-completion stages.

Max Wilson

## About the Authors

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