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Duty of care: is three a crowd?

By Ryan Deane

Introduction

It is well established that in general solicitors owe duties to their clients alone, and do not ordinarily owe any duties of care to those on the other side of the transactions in which they are acting. But there are exceptional cases where solicitors have been held to owe a duty of care to someone who is not their client. In the recent decision of *Ashraf* v *Lester Dominic Solicitors and others* [2023] EWCA Civ 4, the Court of Appeal had to decide whether the facts were exceptional enough to justify departing from the general rule.

Background

The facts arose out of the unfortunate case of Mr Sayed Ul Haq, who was a victim of two consecutive property frauds before dying shortly thereafter, no doubt with a very dim view of his fellow man. His story began when he attempted to sell a property to a Mr Bijan Attarian for £1,250,000. Mr Ul Haq and Mr Attarian had both instructed FLP Solicitors ("**FLP**") to act for them in the proposed sale, such that, unusually, the solicitors were acting for both the vendor and the purchaser.

Money was advanced by Mr Attarian's lender ("**the Bank**") to complete the purchase. In the normal course of events this money would be held by FLP, who would only release it to the vendor in return for a duly executed transfer by the vendor together with a discharge of the vendor's mortgage. Instead, that money was stolen by FLP's office manager, Mr Misba Uddin. Incidentally, Mr Uddin would later appear on a list of 'most wanted' criminals published by London's Metropolitan Police for committing a string of frauds. He was eventually caught and given a lengthy custodial sentence.

As part of the process of regularising matters after the first fraud, the Bank instructed its own solicitors, Rees Page ("**RP**"). At this stage, Mr Attarian was living in the property and wished to register his interest in the property with the Land Registry. RP advised the Bank that all that was needed to finalise the sale was a replacement mortgage in favour of the Bank and a replacement of the conveyancing transfer form ("**TR1**") executed by Mr Attarian and Mr Ul Haq in the presence of solicitors instructed by them.

RP sent the relevant documents to Mr Attarian and received them back each apparently duly signed and witnessed by both Mr Attarian and Mr Ul Haq. RP accordingly applied to the Land Registry to register the transfer and charge. This included lodging an application to change the register ("**Form AP1**").

Box 13 of Form AP1 required RP, in relation to each party, to: (i) confirm that the party was represented by a conveyancer; (ii) confirm that he was satisfied that sufficient steps had been taken to verify their identity; or (iii) provide evidence of their identity. RP completed Box 13, stating that Mr Ul Huq was represented by FLP. Unsurprisingly, given that an FLP employee had stolen the original mortgage advance, Mr Ul Huq was no longer represented by those solicitors.

RP also indicated that it was satisfied that sufficient steps had been taken to verify Mr Ul Huq's identity, placing reliance on the TR1 form signed by him. However, in a second fraud perpetrated against Mr Ul Huq, his signature

on the TR1 form had been forged. This end result was that Mr Attarian was registered as proprietor, but Mr Ul Huq remained liable for the charge on the property, which had never legally been discharged due to the forged signature.

Shortly thereafter Mr Ul Huq died and his estate ("**the Estate**") brought an action against several parties, including against RP for negligently filling out the AP1 form. RP applied for summary judgment on the basis that its client was the Bank and therefore it did not owe any duty of care to Mr Ul Huq.

This argument succeeded at first instance and RP was granted summary judgment. The judge found in favour of RP on the basis that there was nothing in the evidence that the Estate could point to which put the case into a category where, contrary to the usual rule, a solicitor owed a duty of care to a third party.

The usual rule

Before turning to the Court of Appeal judgment in *Ashraf* it is helpful to understand the normal scope of solicitors' duties. In *Minkin* v *Lesley Landsberg* [2015] EWCA Civ 1152, the appellant had divorced and had negotiated a financial settlement with her husband. She consulted solicitors who warned her that the husband's offer was unsatisfactory and that she should negotiate further or, failing that, litigate.

The appellant ignored the advice and instructed a second set of solicitors to enter the financial settlement as a consent order with the court. She subsequently regretted the agreement and claimed damages for professional negligence against her solicitors for, essentially, not giving her the same warning and advice as the first set of solicitors.

Lord Justice Jackson reviewed the relevant authorities and set out the following principles:

> *i) A solicitor's contractual duty is to carry out the tasks which the client has instructed and the solicitor has agreed to undertake.*
>
> *ii) It is implicit in the solicitor's retainer that he/she will proffer advice which is reasonably incidental to the work that he/she is carrying out.*
>
> *iii) In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case, including the character and experience of the client.*
>
> *iv) In relation to (iii), it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.*
>
> *v) The solicitor and client may, by agreement, limit the duties which would otherwise form part of the solicitor's retainer. As a matter of good practice the solicitor should confirm such agreement in writing. If the solicitor does not do so, the court may not accept that any such restriction was agreed.*

On the facts, the retainer of the solicitors was limited to entering the financial settlement as a consent order with the court. The wife's appeal was therefore dismissed, as the solicitor was under no duty to give broader advice

or warnings about the merits of the agreement. Such advice was not reasonably incidental to the retainer in these circumstances.

Court of Appeal judgment

Turning back to the *Ashraf* case, the Estate appealed against the first instance judgment on two grounds. First, that the lower court was wrong to hold that there was no arguable duty of care owed by RP to Mr Ul Huq ("**Ground 1**").

Second, it was inappropriate to grant summary judgment where there were factual disputes between the parties, namely: (i) the Estate's case was that Mr Ul Huq's purported signature on the TR1 was a forgery and (ii) the Estate pleaded that Mr Ul Huq had told RP that he had not signed the TR1 ("**Ground 2**").

The Court of Appeal quickly dismissed Ground 2 on the basis that the Estate could not recover the property even if it successfully proved that Mr Ul Huq's signature on the TR1 was forged because the property had already been legitimately sold to a third party.

Further, there was no evidence in support of the allegation that Mr Ul Huq had told RP that he had not signed the TR1 and in fact the contemporaneous documents suggested otherwise. Given Mr Ul Huq's death, there was no reasonable prospect of such evidence becoming available for trial. The focus of the Court of Appeal's judgment was therefore on Ground 1.

Lord Justice Nugee, giving the leading judgment, began by stating that it was well established as a general rule that a solicitor acting on behalf of his client owes a duty of care only to his client. Where a solicitor is acting for a client, there will almost always be a contract of retainer under which the solicitor agrees to act for the client in pursuit of some end for the client, whether it be non-contentious business such as conveyancing or making a will, or contentious business such as litigation.

Like anyone else providing a professional service, the solicitor *prima facie* impliedly agrees to carry out that service with reasonable care and skill. The core content of the duty of care owed to a client is one of competence. It was therefore obvious why in general a solicitor owes no duty of care to those who are not his clients. He does not owe them any obligation to perform his services with competence for the simple reason that he has not agreed to provide any service to them at all.

After setting out the general position, Nugee LJ continued by recognising that there were three groups of cases that were exceptions to this rule. First, where the very purpose of the solicitor's retainer by his client is to confer a benefit on a particular third party, the classic example being where a client engages a solicitor to make a will in favour of a beneficiary. Here the solicitor by agreeing to act for the client is agreeing to provide a service for the benefit of a third party.

The judge found little conceptual difficulty in concluding that the solicitor owes a duty not only to the client who retains him to provide that service but also to the intended beneficiary for whose benefit he has agreed to provide the service. This exception was, however, not relevant to the current dispute as the Bank did not engage RP to confer a benefit on Mr Ul Haq.

The second set of cases is where the solicitor for one party makes representations to the other party on which the other party relies. In particular, a solicitor will only assume responsibility towards the opposing party if it was reasonable for the latter to rely on what the solicitor said and it was reasonably foreseeable by the solicitor that

he would do so. Again, this exception was not relevant because RP did not make any representations to Mr Ul Huq on which Mr Ul Huq relied.

The final type of case that forms an exception to the general rule is exemplified by the case of *Al-Kandari* v *J R Brown & Co* [1988] QB 665, and it is often referred to as the "*Al-Kandari* exception". That case was between a wife and husband, in which a consent order was agreed by which the husband would surrender his passport (which also included the children on it) to his solicitors. His solicitors arranged for the passport to be taken to an embassy to have the children's names removed, whereupon the husband succeeded in deceiving the embassy into letting it back into his possession.

On the question of whether a duty of care was owed, Lord Donaldson MR said:

> *"In voluntarily agreeing to hold the passport to the order of the court, the solicitors had stepped outside their role as solicitors for their client and accepted responsibilities towards both their client and Mrs Al-Kandari and the children."*

Bingham LJ gave a concurring judgment in which he also referred to the solicitors stepping aside from their role as solicitor for one party:

> *"Ordinarily … in contested civil litigation a solicitor's proper concern is to do what is best for his client without regard to the interests of his opponent. It may nevertheless happen, even in the course of contested civil litigation, that a solicitor for a limited purpose steps aside from his role as solicitor and agent of one party and assumes a different role, either independent of both parties or as agent of both.*
>
> *… It was not necessary for the plaintiff's protection that it should have been the defendants who held the passport. The court or a bank or an entirely independent firm of solicitors could have done it. In so holding the passport the defendants were not acting as solicitors and agents of Mr Al-Kandari, their client, but as independent custodians subject to the directions of the court and the joint directions of the parties. I have no doubt that in this situation the defendants owed the plaintiff a duty of care, since the purpose of holding the passport at all was to protect her lawful rights."*

Nugee LJ held that this exception was relevant on the facts of *Ashraf*. When RP filled in the AP1 form they no doubt did so as solicitor for the Bank. But in filling in Box 13, he was giving confirmations to the Land Registry in relation not just to the Bank but also to Mr Ul Haq and Mr Attarian. The purpose of giving such confirmations was to reduce the risk of property fraud.

What Box 13 required RP to do was to either confirm that Mr Ul Huq was represented by a conveyancer, or to satisfy themselves that sufficient steps had been taken to verify Mr Ul Huq's identity. RP had not satisfied themselves of the latter because of their incorrect belief that Mr Ul Huq was represented by FLP, even though an employee of FLP had recently committed property fraud against him in the same transaction.

The judge accepted that it was arguable that in giving such confirmations the solicitor for the Bank was not acting for the Bank alone but had stepped outside that role and was acting for all parties such as to engage the *Al-Kandari* principle. RP would in those circumstances owe a duty to Mr Ul Huq to act with reasonable care in filling in the form accurately.

Filing in the AP1 form was not just for the benefit of the Bank but for the true proprietor of the property. Identity fraud is a known problem in this area and the likely victim of any fraud would be the true proprietor. It was therefore entirely feasible that the Bank's solicitor owed a duty to the proprietor at the time, Mr Ul Huq.

As such, the Court of Appeal granted the appeal against the summary judgment and directed that the dispute proceed to trial.

Comment

Although the courts have generally been reluctant to find that solicitors owe duties to non-clients, this decision is an example of the courts showing willingness to extend the duty of care in exceptional cases.

It is also a cautionary tale for solicitors when it comes to completing paperwork relating to multiple parties to a transaction. If the court finds in favour of the Estate at trial this could potentially serve to broaden the types of circumstances in which solicitors could be held liable to third parties who are not their clients and to whom they have not agreed to provide a service.

The impact of any such decision could be significant in circumstances where, unlike with the client-solicitor relationship, any liability will not be limited by an engagement letter and may not be covered by insurance. The upcoming trial will be followed by many with interest.